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Universalising jurisdiction over marine living resources crime

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Universalising jurisdiction over marine living resources crime

Abstract

WWF is one of the world's largest and most experienced independent conservation organizations, with over 5 million supporters and a global network active in more than 100 countries.

WWF's mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature, by conserving the world's biological diversity, ensuring that the use of renewable natural resources is sustainable, and promoting the reduction of pollution and wasteful consumption.

The Australian National Centre for Ocean Resources and Security (ANCORS) is a leading provider of research, education and training, and authoritative policy-related advice on ocean law and governance, maritime security and marine resources management.

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REPORT

OCTOBER

2013

UNIVERSALIZING JURISDICTION OVER MARINE LIVING RESOURCES CRIMES

A REPORT FOR WWF INTERNATIONAL

Prof Gregory Rose, Prof Martin Tsamenyi

University of Wollongong

Australian National Centre for Ocean Resources and Security (ANCORS)

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FOREWORD

A growing world population, and especially coastal and island communities in the developing world, depend upon healthy oceans as a source of livelihoods and food. But the oceans are in crisis. As much as 85 percent of global fisheries are exploited to their limits or beyond. Ninety percent of large predatory fish are gone. Coastal habitats are under stress from a multitude of activities.

Efforts to manage fisheries and to protect important marine habitats are stymied by illegal activity. Marine living resource crime, including the illegal catching of fish and the destruction of habitats or ecosystems, often crosses national borders and involves several nationalities, including that of crew, flag of vessel and ownership, as well as in the supply chain from boat to plate.

Marine living resource crime obstructs efforts to sustainably manage marine resources. Serious violations of international rules for the conservation and management of marine living resources need an urgent response. Transnational crime cases warrant international legal cooperation.

Marine living resource crime must be addressed if we are to achieve the goals agreed at Rio+20 to ensure sustainable development. WWF is working to help governments, communities and industry ensure the world's oceans are healthy and can provide food security and sustainable livelihoods into the future.

This report, commissioned by WWF, and prepared by the Australian National Centre for Ocean Resources and Security (ANCORS) sets out a range of options to combat marine living resource crime. It argues for particular international legal actions to enforce laws against marine living resources crimes. Coordinating enforcement requires harmonising enactments against marine living resources crime, which are small, but revolutionary, steps towards universalising jurisdiction to deliver effective governance at sea. States will then better be able to ensure the oceans can provide food security and livelihoods for generations to come.

WWF looks forward to seeing the report's recommendations discussed, developed and implemented and is prepared to assist governments in these important tasks.



John Tanzer
Director
WWF Global Marine Programme

EXECUTIVE SUMMARY AND RECOMMENDATIONS

This Executive Summary and Recommendations sets out practical options for progressing towards universal enforcement jurisdiction over marine living resource (MLR) crime.

The approach is likened to designing a map of vectors, lanes and vehicles for a transport system: First, we make general observations concerning the direction for law and policy reforms. These draw upon our earlier studies of extraterritorial national jurisdiction, coordinated and universalised, to enforce criminal laws. Second, we draw specific conclusions that suggest particular legal and policy avenues to take forward these law and policy reforms. These conclusions are based upon the lessons learned from the case studies. Finally, recommendations are made concerning strategic directions. These are based upon a survey and consideration of the various institutional vehicles potentially available to carry forward universal enforcement jurisdiction over MLR crime.

The map of options is designed to facilitate discussion and projects for the development of universalised enforcement jurisdiction over MLR crime. There is more than one path to the destination and various options could be actioned simultaneously by different agencies. For example, the UN Food and Agriculture Organisation (FAO), a regional marine environment protection organisation and cooperating national administrations could each take different actions that best suit their circumstances. For example, the FAO might initiate an expert workshop and feasibility study, a regional marine protection organisation might develop guidelines and a code of conduct based upon its existing legal instruments, and cooperating national administrations might adopt complementary legislation on MLR crimes and cross-institutional coordination templates that facilitate international law enforcement cooperation.

A. INTERNATIONAL LEGAL PROCESS FOR LEGISLATING MLR CRIMES

Harms to marine living resources, whether in the form of overexploitation of target stocks, by-catch of non-targeted species or marine wildlife species, loss of biological resources, degradation of management systems for the marine environment, or ecosystem disruption and environmental pollution, are of global concern because of their impacts on the global commons or shared marine resources, and the international importance of marine ecosystems to human well-being. However, these harms are crimes only when criminalised under an applicable law.

When marine living resources harm is caused in breach of law, it is sometimes a crime with international dimensions, whether by reason of transnational impacts, the necessity of shared governance, the breaches of global standards for marine conservation and management, or the involvement of transnational organised criminal groups in perpetrating these harms. Even though an act causing such harm may be a breach of international legal standards, the harmful breach is not a criminal act directly prohibited and prosecuted as a crime under international law. International law does not directly criminalise harm to marine living resources.

The most likely existing legal framework within which to situate a new binding legal standard would be the UN Convention on Transnational Organised Crime (CTOC). A protocol to CTOC could be dedicated to MLR crime or protocol could embrace MLR crime in the wider context of crimes at sea. The most likely existing legal framework within which to situate a new, non-binding soft law international standard would be in national legislation implementing the International Plan of Action to Combat Illegal Unregulated and Unreported Fishing, although this is potentially subject to institutional reticence as suggested below.

1. LEGAL PROCESS: No Universal Crimes under International Law

A crime prohibited directly under international law is termed universal. The number of universal crimes is few. Only genocide, piracy at sea, war crimes and crimes against humanity are prohibited directly under international law and the harms that these universal crimes may cause to MLR are purely coincidental.

Promoting a new form of universal crime in the form of a defined series of acts that harm MLR and are criminalised directly under international law would be a most difficult challenge. The four universal crimes established by the mid-twentieth century (genocide, war crimes, crimes against humanity and torture) are even still, in the twenty-first century, subject to major and bitter controversies as to their legal definitions and proper enforcement. Elevating or recasting illegal harms to MLR as universal crimes would be a quite long term and probably quixotic undertaking.

Therefore, an effort to obtain international acceptance of a new universal form of crimes harming MLR is likely to be an expensive, long campaign that will deliver frustrating results and none in the short or medium-term.

RECOMMENDATION 1.1

- **Do not promote a new universal crime under international law of causing harm to marine living resources.**

2. LEGAL PROCESS: Universalise National MLR Crimes

Countries may take action within their national jurisdictions to prosecute MLR crimes. This national jurisdiction extends under international law extraterritorially, in some circumstances, to allow laws to prescribe offences committed within a foreign jurisdiction or on the high seas. Thus, States can prescribe laws with global reach. Universalised national MLR crimes should apply to acts harming the marine environment outside the national maritime zone of the State (i.e. exclusive economic zone, continental shelf, territorial sea, archipelagic waters and internal waters).

RECOMMENDATION 2.1

- **Promote national laws criminalising defined extraterritorial harms to MLR.**

Transnational links, such as the presence of a cross-border element or of multi-jurisdictional actors or elements, are typically present in treaties seeking to suppress terrorism, trafficking and organised crime. They are prerequisites for the application of most crime suppression treaties to ensure recognition of the international nature and importance of coordinated efforts to suppress the crimes specified. Examples of transnational links include the following: (1) the crime occurs in whole or part in an international space, beyond any national jurisdiction; (2) the crime crosses national boundaries, occurring in more than one national jurisdiction; or (3) the perpetrators include more than one nationality. The nature of MLR crime is that it often involves a vessel that operates beyond the boundary of the flag state, is owned in another country, managed in yet another, uses officers and crew of diverse nationalities, and lands its catch in the ports of yet other States. The prerequisite of transnational links in MLR crime could promote consensus on the need for concerted international action to combat MLR crimes specified.

RECOMMENDATION 2.2

- **Require, in order for universalised jurisdiction over MLR criminal law to apply, that a cross-border or multi-jurisdictional element be present in MLR crime, e.g. crossing of international maritime zone boundaries, or agents and objects governed by more than one national jurisdiction.**

3. LEGAL PROCESS: Harmonise National MLR Crimes Definitions

Crimes against MLR are effectively universalised if States adopt the same or similar laws against them. This presumes that the harmonised laws will have common features, preferably optimal features for the effective prevention, deterrence and punishment of MLR crimes wherever they occur.

RECOMMENDATION 3.1

- **To universalise jurisdiction over MLR crimes, harmonised national enactments of MLR criminal laws should have common features that optimise the prevention, deterrence and punishment of MLR crimes.**

A general definition of the crime to be suppressed can aid in the subsequent interpretation of the scope of the MLR crime, lending clarity to its enactment and enforcement. For example, is the scope of the harm it addresses to be confined to fisheries or to extend also to MLR activities unrelated to fishing? Fisheries-related crimes themselves may be defined to extend to the management of by-catch and environmental impacts, as well as to unregulated and unreported fishing. Criminalisation of harm to MLR unrelated to fishing can include activities such as illegal bio-prospecting for marine genetic resources, undermining marine management and conservation systems, and marine pollution and ecosystem disruption. To maximise the potential reach of universalised jurisdiction, MLR crime categories of harm should be defined as broadly as possible within the bounds of international consensus. Thus, proposed categories of harm to MLR should initially include: target fish stocks exploitation; mismanagement of bycatch; biological resources poaching; undermining of management systems, and environmental pollution and ecosystem disruption. The implementation of high seas boarding and inspection highlights the concept of “serious violations” as leading to global consensus on the definition of fisheries crimes on the high seas.

RECOMMENDATION 3.2

- **Define MLR crimes across general categories of harm as broadly as possible within the bounds of international consensus.**
- **Use the concept of ‘serious violations’, as developed in the context of regional fisheries crimes, as the basis for a broader harmonised definition of serious MLR crimes.**

International consensus already supports the prohibition of acts that cause MLR harm as specified under existing marine and environmental treaties and codes of conduct. Thus, breaches of those prohibitions set out in existing marine and environmental treaties that already recognise certain acts of MLR harm as illegal should be drawn upon to define those breaches also as criminal acts, even if committed extraterritorially. These relevant standards are to be found in current global and regional treaties, including the Convention on the Law of the Sea, UN Fish Stocks Agreement, PSM-IUU Agreement, multilateral environmental agreements, regional seas agreements, and regional fisheries management agreements. In addition, FAO codes of conduct and action plans and regional plans of action could provide relevant standards supported by international consensus. Liaison with the signatories to these instruments through their respective governing bodies could provide a way to identify the relevant standards for harmonised criminalisation. For example, in the case of regional agreements, parties to these agreements could choose to nominate the relevant

standards to be implemented through universalised criminal jurisdiction. This would be an ongoing process that could be reflected in an evolving harmonisation instrument, such as one using a simplified procedure for amending its annexes.

RECOMMENDATION 3.3

- **Define specified MLR crimes that supplement a general definition of MLR crime by incorporating schedules of crimes that correspond to standards in existing international legal regimes for MLR conservation and management. Maintain and update definitions of specified MLR crimes through ongoing engagement with parties to the bodies and participants in the processes established by those regimes.**

MLR crimes intersect with other criminal acts that are regarded as serious crimes. These include bribery, money laundering, participation in organised crime syndicates, and obstruction of justice (such as giving false or misleading evidence). These are termed cross-over crimes, as the principal crime ‘crosses over’ into a recognised additional crime. Natural resources crimes, such as MLR crimes, often involve these cross-over features. For example, corruption of public officials managing the natural resources may be required to perpetrate a crime and the obstruction of police investigations and laundering of the proceeds of the crime may be necessary to conceal it. In relation to money laundering, the natural resources crime must be specified as one that triggers the offence of money laundering, i.e. as a ‘predicate offence’ to the subsequent crime of laundering the proceeds.

RECOMMENDATION 3.4

- **National legislation should criminalise ‘crossover’ crimes connected with MLR crimes. Predicate offences for money laundering offences should be amended to include universalised MLR crimes.**

Complicit conduct that supports a principal offence may be proscribed as an ancillary crime. Ancillary crimes include conspiracy, preparation, counselling, procuring and attempt, aiding and abetting, concealment, misprision and participation as an accessory after the fact. Different legal systems may recognise and enact all or only various of those ancillary offences. To ensure that universalised jurisdiction over MLR crimes applies to the broadest possible range of acts of harm, national legislation should criminalise not only the primary offence, but also specify acts that are ancillary to it as crimes.

RECOMMENDATION 3.5

- **The enactment of national legislation prescribing MLR crimes should include the widest possible range of related support acts as crimes ancillary to the primary offence, to the extent allowed by the jurisprudence of the national legal system.**

Many MLR crimes are civil or administrative offences that are regarded as minor rather than serious crimes. Most international law enforcement cooperation ignores minor offences and concentrates on serious offences. To ensure that they are regarded as sufficiently important to trigger international law enforcement cooperation, harmonised MLR crimes should be classified as serious.

Serious offences require a maximum sentence entailing a period of imprisonment or its equivalent, usually at least 0.5 to 4.0 years imprisonment. Harmonisation of specific MLR crimes could qualitatively categorise them as equivalent to serious crimes, and as explicitly triggering law enforcement cooperation mechanisms. Rather than quantify the potential period of imprisonment, penalties could be specified in general terms requiring them to be sufficiently severe to prevent, deter and punish.

RECOMMENDATION 3.6

- **MLR crimes that are specified for harmonisation should explicitly trigger international law enforcement cooperation and should be formally qualified as serious crimes with penalties sufficiently severe to prevent, deter and punish.**

Many jurisdictions have enacted legislation that makes directors criminally liable for illegal company actions. In addition, corporations themselves, as well as individual persons such as company directors, can be subject to direct criminal liability. For example, a fine or community service penalty may be imposed directly on a corporation, a corporation may be suspended from operation or required to advertise a public apology. To increase the potential effectiveness of universalised jurisdiction over MLR crimes, in addition to individual natural persons, corporations should be liable.

RECOMMENDATION 3.7

- **Corporations should be subject to direct criminal liability and sanction for MLR crimes commissioned by them.**

4. LEGAL PROCESS: Cooperate Across Jurisdictions to Enforce MLR Criminal Law

1. Criminal Law Enforcement Cooperation

International law permits a State to enforce its extraterritorial laws. However, most physical enforcement must take place within the State’s own territory, rather than a State being allowed to project its enforcement operations beyond its territory. That is to say, every State already has under international law the power to prescribe criminal laws with global reach, but only limited jurisdiction to physically enforce them, i.e. mostly within its own territories and to some limited extent beyond, such as within its flagged vessels and premises or on the high seas.

Thus, within another State's territory, that other State's cooperation is necessary for the extraterritorial enforcement of criminal jurisdiction. Cooperation requires dual criminality, which is presumed if the crime is enacted in a harmonised fashion by States universalising it; but this may also require that the crime is regarded as a serious crime by them. For optimal flexibility, international cooperation to enforce universalised criminal jurisdiction over MLR crimes should employ the fullest range of mutual legal assistance measures.

RECOMMENDATION 4.1

- **Harmonised MLR crimes should be regarded as serious offences for the purposes of law enforcement cooperation, irrespective of the applicability or potential length of a gaol sentence under national law.**
- **To give effect to extraterritorial criminal law enforcement, a wide range of specified measures for inter-agency cooperation should include:**
 - **Information exchange between designated national agency contact points for:**
 - **Criminal intelligence**
 - **Non-compliance intelligence**
 - **Financial intelligence**
 - **Inter-agency joint law enforcement investigations operations coordinated through approvals processes, including for:**
 - **Covert operations**
 - **Hot pursuit across national borders**
 - **Cooperation in prosecution procedures, including for:**
 - **Mutual legal assistance, such as collecting, preserving, authenticating and supplying evidence, e.g. photographs, samples, witness statements, documents and data**
 - **Extradition of the accused**
 - **Arrangements for witnesses to give evidence**
 - **Prosecution of the accused in lieu of extradition by the cooperating jurisdiction**
 - **Provisions should be made for mutual recognition of judgements applying criminal penalties.**

Civil penalties and civil claims can complement traditional criminal law enforcement measures. Civil penalties include fines, fees and other financial penalties, confiscations, compensation, bans, deregistration, suspensions, community service, enforceable undertakings, injunctions, withheld benefits, mandatory negative publicity, apologies, and so on. Civil penalties or judgements are ordered at the national level but often require international cooperation in order to take effect. Cooperation through international procedures to enforce civil penalties and judgements extraterritorially presumes that they are given formal legal recognition in the foreign jurisdiction.

RECOMMENDATION 4.2

- **To complement the exercise of criminal jurisdiction, civil penalties and judgements should be procedurally available at the national level and supported through international law enforcement cooperation.**
- **Procedures for civil actions and international cooperation to facilitate them should enable:**
 - **Freezing, confiscation and forfeiture of suspect or criminal assets**
 - **Sharing of forfeited criminal proceeds**
 - **Mutual recognition of judgements applying civil penalties**

Dedicated institutional mechanisms can be helpful to facilitate MLR criminal law enforcement cooperation between States. INTERPOL facilitates law operational coordination but is not a mechanism for law enforcement policy review. A specialised policy review forum is needed concerning the design and effectiveness of international MLR crime law enforcement cooperation mechanisms. In some cases, such as for the protection of human rights, review processes include independent expert panels, such as human rights complaints committees. The expert panel model could be utilised also in the field of MLR law enforcement cooperation.

RECOMMENDATION 4.3

- **Establish a conference process to review the design and effectiveness of international cooperation mechanisms for MLR criminal law enforcement**
 - **Establish within that framework an international panel to consider individual and State notifications of difficulty, to provide advice and to make recommendations (including for technical assistance) concerning the integrity of law enforcement cooperation**

2. Port State Measures

The powers of a Port State to set conditions for entry into port, even conditions that seek to protect MLR beyond its exclusive economic zone, is a form of universalised enforcement jurisdiction through which it can enforce against foreign vessels voluntarily entering its ports. The full range of enforcement powers is available to the Port State to enforce against vessels voluntarily in its ports for the commission of MLR crimes, including civil penalties and vessel forfeitures and criminal prosecutions. To avoid disadvantage to individual ports applying Port State measures (PSMs), consensus among like-minded Port States on a common program for the coordinated imposition of an expanded program of PSMs must be an important part of any future strategy to universalise jurisdiction for better protection against MLR crime. A comparison of the practice of Port States in exercising controls over vessel pollution and safety indicates some improvements that might be made to PSMs for IUU fishing, as suggested in the following recommendations.

RECOMMENDATION 4.4

- **Urge ratification of PSM-IUU Agreement.**
- **Port authorities should impose both civil and criminal penalties for breach of MLR-related conditions for port entry.**
- **Convene a consultative workshop on refinements to requirement under the PSM IUU Agreement pending its entry into force, concerning how it could be made more efficient by:**
 - **Quantification of requirements for advance notice (e.g. time, data) by foreign fishing vessels prior to intended port entry;**
 - **Using a fishing vessel risk profile as the basis for inspection sample rate requirements;**
 - **Initiating inspections on the basis of information provided by another Port Authority or by a third party;**
 - **Defining protocols for detailed inspections;**
 - **Requiring more specificity of the reports Flag States are to make on actions they take to remedy non-compliance;**
 - **Setting criteria for the restoration of good standing of a fishing vessel.**

A global MLR blacklist can be compiled to deny the use of port facilities for any blacklisted vessel. A global MLR blacklist could leverage off regional blacklists already established by RFMOs and the High Seas Vessel Authorization Record established by the FAO under Article VI of the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. The global blacklist might comprise schedules specific to particular categories of offences. The formal establishment of a global blacklist might be facilitated by a common resolution by each RFMO to compile information and generate a global list; or by a resolution under the UN Convention on the Law of the Sea; or by a resolution under the FAO Committee on Fisheries.

RECOMMENDATION 4.5

- **Convene a consultative inter-regional workshop to compile a global MLR blacklist of vessels in breach of, or strongly suspected of being in non-compliance with, specified conservation and management norms.**
 - **The list should include, as well, vessels under common management with vessels conducting illegal activities, and vessels actively supporting a breach or non-compliance.**

A non-cooperating State blacklist could be compiled to target flags of convenience and ports of convenience to discourage their use. Naming on the list might diminish the public international status of the non-cooperating Flag State or Port State and also result in non-arbitrary and justified disadvantage in terms of port access, flagging, joint-venture and MLR trade opportunities. Consideration of the criteria established by the FAO Committee on Fisheries and the EU for determining whether Flag State compliance with international MLR conservation and management norms could form starting points for criteria concerning non-cooperating State black lists.

RECOMMENDATION 4.6

- **Conduct consultation on the establishment of global non-cooperating State lists for determining whether a Flag State or a Port State is not complying with international MLR conservation and management norms and on the feasibility of establishing a non-cooperating Flag State blacklist.**

3. Long-arm Unilateral Jurisdiction

To influence behaviour in foreign jurisdictions, long-arm laws applied within the limits of international comity are a widely accepted tool, particularly when using legal jurisdiction based upon active personality. The criminalised behaviour may be the original conduct in a foreign jurisdiction or its consequential conduct within the criminalising jurisdiction, such as possession of illegally produced goods or disguising their origins. The penalties for consequential conduct often include civil penalties, such as

confiscations, that result in debts over or arrests of vessels. They may also entail civil standards of proof of debt that infer the illegality of the good's production from the criteria used in the good's market certification requirements.

RECOMMENDATION 4.7

- **Convene regional workshops on long-arm jurisdiction over MLR crime to promote its utilisation, addressing, inter alia:**
 - **Unlawful possession of MLR produced in breach of foreign or international law**
 - **Money laundering for which the predicate offence is MLR crime**
 - **Strict liability and standards of proof for civil penalties**
 - **Debts arising from penalties for MLR crimes and consequent sharing of forfeited assets**

B. STRATEGIC ROUTES FORWARD TO UNIVERSALISE MLR CRIMINAL JURISDICTION

MLR crime can be combated using both legal and institutional mechanisms. The following survey and assessment of existing mechanisms is divided between legal frameworks and institutional frameworks. The legal frameworks are subdivided according to whether they are international or regional and then further categorised according to their primary area of concern, i.e. whether they deal primarily with marine, environment, or general crime concerns, according to their original purpose. Institutional frameworks are subdivided in the same way, into global and regional bodies.

5. STRATEGIC ROUTES: Global Legal Frameworks

A new international legal framework to harmonise definitions of certain MLR crimes would carry forward the universalisation of jurisdiction to enforce against them. It would build on existing international laws for criminal law enforcement cooperation by raising the understanding, profile and importance of MLR crime and by developing tailored provisions suited specifically to law enforcement within the multinational context and transnational commission of MLR crimes. The observations set out below in relation to options to develop a global legal instrument seek both to enable States to prescribe harmonised MLR crimes and to exercise universalised MLR enforcement jurisdiction.

The following survey demonstrates that, at the global level, no legal regime specifically concerning the punishment of MLR crimes has yet been established. The survey also shows that many more treaties and institutions criminalising some relevant aspect of, or potentially applicable to, MLR crimes have been developed within the legal frameworks for crime prevention than those for general affairs, marine or environment protection. This is to be expected as crime prevention laws and institutions have long been concerned with universalising jurisdiction to enforce against crimes. In contrast, international bodies concerned with general affairs, marine and environmental affairs are primarily concerned with standard setting rather than criminal law enforcement.

1. Marine Legal

Fisheries management has extensive impacts across the broad range of management of other MLR, as fisheries activities impact on target stocks but also on non-fish species affected as by-catch or impacted by degradation of ecosystem integrity and by environmental pollution. Legally binding global standards for the management of fisheries are set out in the UN Convention on the Law of the Sea 1982, FAO Compliance Agreement 1993, UN Fish Stocks Agreement 1995, and the FAO PSM-IUU Agreement 2009, etc.

However, fisheries treaties tend not to require criminalisation of breaches by individuals of their prescribed standards. Instead of engaging criminal justice systems, they address breaches through managerial and administrative capacity building mechanisms. Breaches of internationally prescribed standards of conduct are treated as non-compliance problems rather than universalised crimes.

The PSM-IUU Agreement provides the most relevant legal framework for the universalisation of MLR crimes. A protocol to the Agreement, or a declaration or resolution by the parties to it, could seek to harmonise among its parties the adoption of national criminal provisions and to universalise enforcement jurisdiction through law enforcement cooperation. However, as the Agreement has yet to come in to force and has many implementation hurdles to clear, a push to universalise MLR crime under it is premature at this time.

With the exception of the PSM-IUU Agreement, which has not yet entered into force, international standards directly governing MLR crimes are set out in non-legally binding policy instruments. These include UN Resolutions on Driftnet Fishing, UN Resolutions on Sustainable Fisheries, the 1995 FAO Code of Conduct on Responsible Fishing, as well as FAO Guidelines such as the International Plan of Action on Capacity, International Plan of Action on Seabirds, International Plan of Action on Sharks, and the 2004 FAO Model Scheme on Port State Measures to Combat IUU Fishing.

To combat illegal fishing, the most important among these soft law instruments is the International Plan of Action-IUU Fishing adopted by the FAO in 2001. The IPOA-IUU offers a promising basis upon which to build the non-legally binding normative infrastructure for universalised MLR crime. Likelihood of success in this endeavour is better than for a legally binding framework such as the PSM-IUU Agreement.

Soft law instruments may be more achievable in the near term than a legally binding international agreement. The difficulty of reaching consensus on binding terms also can result in decline to a lowest common denominator in the adopted binding obligations. Soft law, in the form of guidelines and best-endavours commitments, on the other hand, may be expressed in more ambitious aspirational terms. Soft law can also build both consensus and international practice concerning international standards in the interim until binding measures are adopted. For example, guidelines on the universalisation of MLR jurisdiction could urge the further adoption of legally binding agreements at the bilateral or regional levels to facilitate cooperative enforcement actions (such as is urged also under the 1988 UN Drug Trafficking Convention).

RECOMMENDATION 5.1

- **Initiate a soft law development process to supplement the IPOA-IUU with guidelines promoting the harmonised enactment of extraterritorial MLR crimes and the exercise of criminal jurisdiction over them.**

2. Environmental Legal

None of the multilateral environmental agreements (MEAs) that aim to resolve global environmental problems address themselves to the shaping of domestic mechanisms of criminal law or to international legal cooperation in relation to their enforcement. They commonly require simply that parties take the appropriate legal and administrative measures to implement and enforce their obligations under the MEA. However, it is not uncommon for them to set out provisions for law enforcement cooperation. A partial exception is the Basel Convention on Hazardous Waste, which declares illegal traffic in hazardous wastes to be criminal. It provides a model for the universalisation of criminal jurisdiction against transnational criminal activity, including model legislation, a database of national legislation, guidance for detection, prevention and control of illegal traffic, and a legal instruction manual on prosecuting illegal traffic. The legal model provided by the Basel Convention demonstrates how the universalisation of enforcement jurisdiction against MLR crime might evolve over time.

RECOMMENDATION 5.2

- **Utilise the model provided by the Basel Convention on Trafficking in Hazardous Wastes to commit to prevent and punish MLR crime offenders. The gravity of the illegality should be categorised as criminal at a serious level and technical assistance made available to develop model criminal laws, develop a database, compile an instruction manual and conduct regional training workshops.**

3. Criminal Justice Legal

In contrast to the MEA regimes, global cooperative efforts to combat transnational crime have produced many treaties that require that their parties to proscribe specified acts as criminal. As yet, none of these require the proscription of specific acts of MLR harm. Nevertheless, if some MLR crimes under national laws are serious offences that carry a maximum penalty of no less than 4 years gaol and if they are conducted by organised transnational criminal syndicates, then the *Convention on Transnational Organised Crime* (CTOC) would apply requirements that its parties to cooperate in their suppression and punishment. There are signs of momentum gathering to address environmental crime under the CTOC. Naturally, this would concern environmental crime that is transnational and organised, which would cover much MLR. There is no suggestion yet to commence any negotiations on a CTOC protocol on natural resources and environmental crime. However, formulation of a binding protocol suitable to combat MLR crime would be conceptually straight forward. The CTOC is the natural and most likely global framework for new legally binding commitments to universalise MLR crimes.

Other multilateral crime prevention treaties requiring that their Parties act to prohibit and punish corruption and bribery relate to transnational environmental crime but tenuously, as corruption and bribery are often incidental activities that facilitate environmental crimes. The OECD Bribery Convention offers very limited possibilities for universalising jurisdiction over MLR crimes. It applies already to corrupt transactions in the MLR sector. Even though widespread, these are only those involving international transactions with foreign countries, involving also foreign public officials, active bribery and Parties that have ratified the OECD Convention. The UN Convention against Corruption (UNCAC) applies primarily to domestic corruption without a transnational link required but does provide for international technical assistance and capacity building. It could provide a useful legal framework for capacity building in fisheries ports for fisheries and customs inspectors in order to constrain corrupt facilitation of MLR crimes.

RECOMMENDATION 5.3

- **Encourage a new binding protocol under tCTOC in the form of commitments to adopt national legislation to harmonise enactments of MLR crimes in consultation with MLR management and conservation organisations. The legal framework could link relevant 'crossover' crimes that support MLR crimes, such as bribery, money laundering, conspiracy and participation in organised crime syndicates, as well as serve also as a basis for national law enforcement cooperation applied to the widest possible range of MLR offences, such as information exchange, mutual legal assistance, extradition and transfer of proceedings, as well as for operational initiatives such as joint investigations.**

6. STRATEGIC ROUTES: Regional Legal Frameworks

Progress in the assertion of criminal jurisdiction over national resources crimes have occurred only at the regional level. Those regions comprise the European Union, southern Africa and the insular Pacific. In the European Union and the insular Pacific, these advances have specifically concerned marine pollution (2005 EU Directive on ship-source pollution and on the introduction of penalties for infringements) and marine living resources (1992 Niue *Treaty on Cooperation and Fisheries Surveillance and Law Enforcement in the South Pacific Region*). In line with this regional progress, expanding the number of regional legal frameworks addressing MLR crime would be an appropriate way to advance the universalisation of criminal jurisdiction over MLR crime.

RECOMMENDATION 6.1

- **Consider a regional legal framework from which to commence the universalising of criminal jurisdiction over MLR crimes.**
 - **A flexible approach could enable actions at regional level or by its individual regional States**

1. Marine Legal

Some regional fisheries management organisation agreements on implementation of conservation and management measures set out maritime enforcement cooperation procedures. The forms of cooperation include intelligence sharing, joint enforcement operations, mutual legal assistance, extradition and sharing of seized assets. There are legal precedents in regional fisheries management agreements legal frameworks for cooperation also in related criminal justice enforcement. These legal precedents suggest that expansion of criminal law enforcement cooperation to include a broader range of MLR is feasible.

RECOMMENDATION 6.2

- **An amendment, protocol, resolution or guidelines under a regional MLR management framework could nest a range of MLR crime harmonisation and cooperative enforcement measures.**
 - **Propose that regional agreements authorise State enforcement jurisdiction against foreign vessels, crew and assets, based on evidence of an MLR offence as defined by the regional MLR agreement.**
 - **Propose that regional MLR agreements include law enforcement cooperation in freezing financial assets of corporations and beneficiaries, blacklisting vessels, and the issuing of warrants against individuals charged with IUU fishing or associated non-fishing offences such as support or 'crossover' crimes.**

2. Environmental Legal

Two regions have adopted legal instruments that provide frameworks to combat environmental crime through environmental law enforcement cooperation. There is scope for additional legal instruments for law enforcement cooperation to be adopted for other regions. In 2008, the Council for the European Communities adopted a directive on the protection of the environment through criminal law. It addresses breaches of national laws that implement Community environmental Directives by treating as criminal offences those environmentally harmful conducts already made unlawful by previous Community laws. This is a preferable model for a multilateral instrument on MLR crime because it leverages off already established consensus concerning what acts are to be defined as unlawful. Thus, environmental harms that countries have already agreed to treat as unlawful under MLR laws form the basis of the acts to be criminalised under a new multilateral instrument.

In relation to MLR, the Agreement on the Conservation of Cetaceans of the Black Sea Mediterranean Sea and Contiguous Atlantic Area and various MOUs under the 1989 Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS), provide instances of regional MLR conservation standards. The UNEP RSP has adopted binding MLR protocols under framework conventions for six regions: Eastern African Region; South East Pacific; Wider Caribbean Region; Mediterranean; Red Sea and Gulf of Aden; and Black Sea. Due to the respective interests of their respective regional organisations, discussed in section 8 below, the MLR agreements for which initiative to harmonise criminal jurisdiction over MLR crime might be pursued are the South East Pacific and the Wider Caribbean Region.

RECOMMENDATION 6.3

- **Consult with potentially interested members of regional marine environmental organisations with a view to harmonising regional MLR crimes by drawing upon accepted regional MLR management standards under the:**
 - **Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South East Pacific 1989**
 - **Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region 1990**

7. STRATEGIC ROUTES: Global Organisations

The phenomenon of MLR crime has registered to varying degrees with global and regional institutions. Likely institutional vehicles at the global level to carry forward an initiative for the universalisation of MLR crime were canvassed by categories: general,

marine, environmental and criminal justice institutions. The following recommendations are preliminary and require further substantive research on the relative merits of specific institutions and institutional strategies.

1. Marine Organisations

Global institutions engaged in MLR issues are more likely to be successfully engaged in a project to universalise jurisdiction against MLR crimes. It would be a major step forward to have the area of MLR crime adopted as the theme of a meeting of the UN Informal Consultative Process on Oceans and Law of the Seas (UNICPOLOS) meeting and then as an area that could benefit from the attention of the General Assembly and the UN Secretary General. As a result of the sensitivity of the area of MLR crime for countries whose nationals organise illegal fishing activities, priority for this area on the UNICPOLOS agenda might be more accessible if presented as a facet of the broader area of maritime crime. A crime against MLR could then be highlighted in panel presentations.

RECOMMENDATION 7.1

- **Promote a UNICPOLOS theme devoted to MLR crime as a facet of the broader area of maritime crime.**

2. Environmental Organisations

UNEP's initiatives in relation to compliance with multilateral environment agreements (MEAs) and enforcement of national laws is closely related to the prosecution of environmental crimes. Its work on capacity building for judges and prosecutors are aspects of this engagement. A focus on combating transnational environmental and MLR crime would be an aspect of that engagement and complements its existing work. However, it would need to be conducted in close consultation with other international organisations more directly involved in marine and crime prevention issues, particularly the Commission on Crime Prevention and Criminal Justice (CCPCJ), CTOC Conference of Parties, INTERPOL and the UN Food and Agriculture Organisation (FAO).

RECOMMENDATION 7.2

- **UNEP is an appropriate vehicle to carry forward an initiative to universalise jurisdiction to combat MLR crime but would need to be in partnership with other international organisations more deeply engaged in MLR conservation and management.**

3. Criminal Justice Organisations

Among UN organisations currently engaged in combating environmental and MLR crimes, UNODC is likely to be most able to take forward an initiative to universalise jurisdiction to combat MLR crime. Environmental crime is an area of emerging crime that UNODC will become increasingly engaged in both by virtue of its own mandate and by reason of its Secretariat role to bodies such as the CCPCJ and the Conference of Parties to the CTOC. It is not a political body and will not mandate political actions such as the drafting of guidelines or commencement of treaty negotiations. Its role would be to conduct research and publication and to organise a workshop on the subject, if mandated to do so by a policy-making body such as the CCPCJ or CPC.

The CCPCJ is the primary United Nations system decision-making body forming policy in the area of environmental crime. The work that it has undertaken since 2007 is liable to be expanded in the future to address fishing crimes. The CCPCJ is, therefore, a most important vehicle for progressing the development of policy for universalised MLR crime within the UN system. To reinforce the work of the UNODC on MLR crime, it might be possible also for the UN Congress on Crime Prevention and Criminal Justice (Congress) to pick up the MLR crime issue in 2015 as part of its mandate to set the agenda for international cooperative projects for the progressive development of criminal justice.

RECOMMENDATION 7.3

- **Promote the adoption of policy by the CCPCJ (and Congress) in favour of the development of universalised jurisdiction over MLR crimes and request UNODC to research implementation of this policy, particularly, to conduct workshops and consultations with MLR bodies.**

INTERPOL is rapidly expanding its Environmental Crime Programme and opportunities to promote the universalisation of jurisdiction over MLR crime are available through the new Fisheries Crime Working Group. A useful strategy could be to prepare an INTERPOL report on the contemporary problems of international legal gaps in national enforcement jurisdiction over fisheries or MLR crime. The report could be commissioned for consideration by the Fisheries Crime Working Group to canvass solutions including the universalisation of enforcement jurisdiction. Although the UN Interregional Crime and Justice Research Institute (UNICRI) has no mandate to develop legal norms but functions only as a research institute or think tank, it could also provide a forum for developing research and knowledge concerning global MLR crime, including aspects of the universalisation of national jurisdiction.

Dialogue with the Financial Action Task Force (FATF) to increase awareness of its members and of the OECD Secretariat concerning the importance of MLR crimes would encourage the future inclusion by the FATF of MLR crimes as a designated category of offences for predicate crimes in money laundering.

RECOMMENDATION 7.4

- **Engage INTERPOL and UNICRI and to develop reports and research in this area and open dialogue with the FATF to encourage it to designate MLR crimes as predicate offences for money laundering.**

4. General

As noted in Recommendation 6.1 above, UNICPOLOS could provide an avenue through which the issue of MLR crime might be brought to the attention of the UNGA. The UNGA could then mandate that the UN Secretary-General prepare a report on the threats posed by MLR crime and opportunities to combat MLR crime.

RECOMMENDATION 7.5

- **Build preparatory support within UNGA to instruct the UN Secretary-General to prepare a report on the threats posed by MLR crime and legal and institutional opportunities to combat them.**

8. STRATEGIC ROUTES: Regional Organisations

Regional institutions bolster economic and political solidarity, environmental protection or marine resources management and are greater in number than global institutions but are sometimes poorly resourced and ephemeral. Regional organisations for economic co-operation are typically better resourced and more robust than narrowly mandated environmental or fisheries management organisations. However, regional fisheries management organisations that serve clear economic goals may enjoy longevity and adequate resources to fulfil mandates, including MLR criminal law enforcement.

1. Marine Organisations

Regional fisheries management organisations (RFMOs) have been established where there are active international fisheries and for waters where fish stocks cross international maritime boundaries. The dynamics within each RFMO vary in each regional context. Indicators that an RFMO might be suitable to carry forward the universalisation of criminal jurisdiction over MLR crime include the presence of numerous coastal States with clearly defined MLR conservation and management interests; numerous and/or strong coastal State participation; distant water fishing States with benign interests in fisheries and strong law enforcement capacity; as well as a governing treaty and constitutional structure that facilitates innovation and integrates broad MLR conservation and management objectives. These elements are present in the Western and Central Pacific Fisheries Commission (WCPFC) region where the Pacific Islands Forum Fisheries Agency (FFA) provides a strong coastal State base of interest. Provisions in its members' Niue Treaty, which includes mutual legal assistance in criminal prosecutions and civil procedure confiscations, suggest that universalisation of criminal jurisdiction against MLR crime is a feasible development in the south-west Pacific region. Similarly, strong coastal State interests are present in the Regional Plan of Action to Promote Responsible Fishing Practices Combat IUU Fishing (RPOA) that has been adopted in South East Asia.

RECOMMENDATION 8.1

- **Work through FFA and relevant members of the WCPFC to carry forward the universalisation of criminal jurisdiction over MLR crime in its region.**
- **Work through the RPOA to carry forward the universalisation of criminal jurisdiction over MLR crime in its region.**

2. Environmental Organisations

Each regional seas marine environment program is influenced by the level of regional political and economic integration, of available operational funding, the presence of driving economic forces, participation of economically developed coastal states with benign interests, their relative numbers within the regime, as well as the character of impacts on marine biodiversity. In the Wider Caribbean Region, the Caribbean Environment Programme is serviced by a secretariat provided by UNEP, established in 1986 in Kingston, Jamaica. The parties to the regional marine environmental framework agreement and its protocols, including the 1990 Protocol on Specially Protected Areas and Wildlife, are the regional organisation's members, including the United States, which generates resources and expertise to combat MLR crime.

In the South East Pacific, the Permanent Commission for the South East Pacific is an independent regional secretariat, established in 1952 and based in Ecuador. It administers the 1989 Protocol for the Conservation and Management of Protected Marine and Coastal Areas. Its members are Chile, Colombia, Ecuador and Peru, who are parties to the UNEP regional seas framework convention. Chile plays an important role due to its extensive coastal zones. The Commission engages in significant efforts to combat maritime crimes in the region, especially IUU fishing and, therefore, has an established interest in the collective efforts to combat MLR crimes.

RECOMMENDATION 8.2

- **Work through the Permanent Commission for the South-East Pacific to organise a workshop on a criminal jurisdiction initiative to combat MLR crime under the RSP program. Similarly, approach the Caribbean Environment Program.**

LEGAL PROCESSES

DEFINE

MLR CRIMES

- ↳ General formula
 - MLR
 - Harm

UNIVERSALISE

EXTRATERRITORIALITY

- ↳ Transnational link
- ↳ Long-arm

HARMONISE

SPECIFIC OFFENCES

- ↳ Global & regional standards
 - Marine schedules
 - Environmental schedules
- ↳ Serious offence & sanctions

OPTIMISATION FEATURES

- ↳ Crossover offences
- ↳ Ancillary offences
- ↳ Corporate offences

ENFORCEMENT JURISDICTION

LAW ENFORCEMENT COOPERATION

- ↳ Legal assistance, confiscation, extradition

LONG-ARM MEASURES

- ↳ Civil penalty debts, Unlawful possession

PORT MEASURES

- ↳ PSM-IUU, Global blacklist, Non-Cooperating

HIGH SEAS MEASURES

- ↳ Global record, Inspections at sea

STRATEGIC ROUTES FOR OUTPUT DELIVERY

			LEGAL FRAMEWORKS	INSTITUTIONAL VEHICLES	▶	BEST CONNECTIONS
GLOBAL	Marine living resources	●				
		●	PSMA	FAO		
		●	IUU Code	UNICPOLOS		IUU Code ← FAO CTOC ← UNICPOLOS/ CCPCJ/UNODC/ INTERPOL
	Environment	●	CITES, CBD. (Basel)			
		●		UNEP		
		●				
	Criminal justice	●	UNCAC, OECD	WCO		
		●		UNICRI, CPC, FATF		
		●	CTOC	CCPCJ, UNODC, INTERPOL		
	General	●		ECOSOC		
		●		UNGA		
		●				
REGIONAL	Marine living resources	●				
		●	RFMOS			
		●	RPOA, FFA	FFA		WCPFC ← FFA RPOA ← ASEAN members
	Environment	●				
		●				
		●	RSP Caribbean, RSP SE Pacific			SPAW ← RSP Caribbean 1989 Protocol ← CPPS
	General	●	EU			
		●	ECOWAS			
		●				

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CHAPTER 1

INTRODUCTION

This Report on Universalised Jurisdiction over Marine Living Resources Crime explores both the notion and the potential for practical application of criminal jurisdiction with global reach to prosecute criminals engaged in crimes against marine living resources.

There are compelling reasons for international concern over illegal harm to MLR and to mobilise coordinated action against it. Although common understanding on the international legal mechanisms needed to suppress MLR crimes effectively is gathering strength, it does not currently indicate a clear grasp of the potential uses of universalised criminal law jurisdiction to enforce against breaches of MLR conservation rules. The clear trend towards universalisation of criminal law enforcement in other fields, particularly through coordinated international law enforcement to combat organised crime, suggests that such coordination in relation to MLR crime could follow.

The Universalised Jurisdiction over Marine Living Resources Crime project explores the scope, limits and potential development of universalised criminal jurisdiction over MLR crime. This requires examining the meanings of its underlying concepts of harm and of crime and how they are internationalised. The meaning of marine living resources (MLR) crime is examined, identifying prohibited harms, such as damage to protected habitats, illegal trade in endangered species and theft of genetic resources. Universalised criminal jurisdiction is a key concept, referring to the internationally harmonised definition of these crimes and the international coordination of national legal powers to enforce against them. It is examined in depth and contrasted with universal jurisdiction, a different form of international jurisdiction, more usually exercised by an international court of a harm directly prohibited under international law. Universalised criminal jurisdiction occurs under national laws, by harmonising national proscriptions of the criminal conduct against MLR within countries and extraterritorially, and further, by facilitating international law enforcement cooperation between national constabularies, ports, customs, quarantine and other authorities.

International harmonisation of MLR crimes in national laws would draw principally upon existing international legal standards for MLR conservation set out in global and regional agreements. It would identify those MLR standards of central concern to the international community, for which breaches are considered serious violations of binding international standards. It would unpack the concept of illegal unreported and unregulated fishing ('IUU') to focus on specifically illegal acts that shape MLR offences. International law enforcement cooperation to exercise universalised enforcement jurisdiction would draw upon techniques including: criminal and financial intelligence gathering and exchange; mutual assistance in collecting evidence for prosecutors; arrests and extraditions; stolen asset seizures, confiscations and sharing; and sharing of organisational resources to strengthen national law enforcement capacity. Due to MLR crimes at sea involving special physical challenges, multilayered cooperation between government departments across sectors and between countries is needed.

The project undertakes case studies on practical exercises of MLR law enforcement jurisdiction by national administrations and international organisations. The case studies consider extraterritorial and internationally coordinated exercises of jurisdiction to investigate how (or whether) they actually enforce beyond their borders against MLR crimes. The studies include international law enforcement cooperation for the suppression of transnational organised crime, long-arm penalties against foreign crimes, Port State control measures, and high seas boarding and investigation of foreign vessels.

The Universal Jurisdiction over Marine Living Resources Crime project concludes by considering practical opportunities to harmonise national definitions of MLR crimes and to strengthen international coordination of enforcement against them. It surveys existing legal frameworks and international vehicles potentially available at the global and regional levels to carry forward the progressive development of universalised jurisdiction over marine living resources crimes.

Part I – Conceptual

Part I of the Report addresses conceptual matters essential to understanding the research project. These include the notions of global marine harms, crime, jurisdiction and the universalisation proscription of crimes.

Chapter 2 – Global Marine Harms

An exploration in Chapter 2 of the conceptual material sets out a description of marine living resources (MLR) harms of global concern and an explanation of reasons why MLR crimes that cause these harms are suitable subjects for international attention. These reasons include the international impacts of MLR crimes directly on the global commons or shared marine resources, and the international importance of marine ecosystems to human well-being. In addition, some MLR crimes have international significance due to their international impacts on the work of shared international governance, their undermining or breaching of

global standards for marine conservation and management, and the involvement of transnational organised criminal groups in perpetrating these harms.

Chapter 3 – Crime

The concept of crime is introduced in Chapter 3, which analyses crime into its core elements of conduct obligations and sanctions. It compares serious crimes with MLR offences, which are typically treated as less serious civil or administrative offences. The distinction is important, as crimes widely considered to be suitable subjects for international attention are those characterised as serious, rather than as civil or administrative. Therefore, it would be necessary to elevate the characterisation of MLR crimes to serious crimes in order to treat them as international crimes. The material on crime also discusses trends in the designation of corporations as criminal actors, due to the prevalence of complex corporate structures for fishing ventures, and the nature of ancillary crimes related to MLR crimes. The distinction is made between universal crimes, which are prescribed under customary international law, and universalised crimes, which are coordinated under treaties but take legal effect only when States prescribe them under their national laws.

Chapter 4 – Jurisdiction

Following the discussion of crime, the notion of jurisdiction is examined in Chapter 4. Prescriptive and enforcement aspects of the exercise of State jurisdiction are distinguished. Prescriptive jurisdiction is the State power recognised under international law to make laws but this recognised power attenuates as prescription becomes extraterritorial. A State's enforcement jurisdiction is its power recognised under international law to enforce laws and it is primarily exercised within the State's territory. However, it can be exercised within State territory to enforce laws prescribed extraterritorially and it can also be physically exercised beyond territory in some circumstances. National enforcement of two crimes of universal jurisdiction are compared – piracy and humanitarian crimes – demonstrating the legal risks presented by competing concurrent enforcement jurisdictions using different legal processes to cover the same subject crime and person.

Chapter 5 – Universalised Crimes

The Report analyses, in Chapter 5, the circumstances under which States are willing to prescribe crimes in order to universalise jurisdiction over a crime. It surveys international treaty crimes concerning political violence, organised crime and trafficking and finds that an international link factor is usually required. This is an event in commission of the crime that is transnational. Nevertheless, humanitarian crimes do not require a transnational event. The means of coordinated international criminal law enforcement are then briefly noted, prior to being considered at greater length as a case study in Chapter 10.

Part II – Case Studies

Part II embarks upon a series of case studies intended to reveal trends and opportunities relevant to the universalisation of enforcement jurisdiction against MLR crimes. The case studies concern the exercise of criminal law enforcement cooperation against organised crime, of long arm national criminal measures, of port state measures high seas boarding and of inspections of vessels.

Chapter 6 – Transnational Law Enforcement Cooperation

Intersections between MLR crime and transnational organised crime are manifold, including bribery and corruption, money laundering, obstruction of Justice, participation in organised criminal groups, conspiracy, and other serious offences. International law enforcement cooperation enables the enforcement by one country of its laws against such offences, even though aspects of the enforcement process occur within another country's jurisdiction. International law enforcement cooperation has many aspects, both informal and formal, within the constraints of that other's voluntary cooperation. Informally, countries may cooperate to exchange criminal intelligence. Formally, they may provide each other with evidence admissible in their respective courts, extradite indicted persons or witnesses, and officially recognise each other's criminal procedures and sentences.

Chapter 7 – Long-arm National Measures

The exercise of national laws designed to affect behaviour within foreign jurisdictions is termed 'long-arm jurisdiction'. Within the limits of international comity, international law permits the enactment of legislation with such extraterritorial application, but not the unilateral enforcement of that law within another country's jurisdiction. Therefore, long-arm legislation needs to be enforced principally within the jurisdiction of the enacting country. In legislating against foreign MLR crimes, long-arm legislation may criminalise illegal harvesting of MLR, possession or handling of illegally harvested MLR products, or disguising the origin of such products. These offences are enforced as crime against the law in the enacting country, even though the original illegal act occurred in other countries jurisdiction.

Chapter 8 – Port State Measures

The case study of port state measures reveals an important opportunity to universalise exercise enforcement jurisdiction. The powers of a Port State to set conditions for entry into its ports are granted to it under customary international law. They present an enormously powerful jurisdiction to enforce the protection of MLR laws, even those prescribed for waters beyond those of the Port

State. The compilation of a global blacklist of vessels associated with MLR crimes that would signify global denial of the use of port facilities to any blacklisted vessel would have the effect of universally enforced MLR conservation laws. Chapter 6 also finds that, to discourage the use of flags of convenience, a non-co-operating Flag State blacklist could be compiled that would signify denial of the support facilities also to any blacklisted Flag State.

Chapter 9 – High Seas Boarding of Vessels

The case study in Chapter 7 finds that, under the 1995 UN Agreement on Straddling and Highly Migratory Fish Stocks, the physical exercise of enforcement power against MLR crime has been extended extraterritorially in circumscribed circumstances. It examines the 1995 Agreement's implementation by the Western and Central Pacific Fisheries Commission through the Commission's High Seas Boarding and Inspection Procedures. The concept of 'serious violations' identified in inspections, as adapted from the 1995 Agreement and set out in the Procedures, is leading to global consensus on the definition of serious MLR crimes. Such a consensus is necessary in order to define international MLR crime.

Part III – Findings

Part III addresses the practical implications of the research. It considers the pragmatic institutional aspects of how to universalise enforcement jurisdiction against MLR crimes and brings the project to its conclusion by making a series of recommendations.

Chapter 10 – Global Legal and Institutional Options

Chapter 11 is a survey of legal models and institutional vehicles that might be available to progress the universalisation of enforcement jurisdiction against MLR crimes. The survey is divided into studies of laws and institutions. Each of these is subdivided for convenience of treatment into general, marine, environmental and criminal justice groupings of laws and of institutions. Priority legal developmental opportunities are identified as soft law under the *International Plan of Action - IUU* and a protocol under the *United Nations Convention against Transnational Organized Crime*. Institutional fora that could, within their evolving mandates, host events on the universalisation of enforcement jurisdiction against MLR crimes are the: UN Open-Ended Informal Consultative Process on Oceans and Law of the Sea, UN Environment Programme, UN Commission on Crime Prevention and Criminal Justice, UN Office on Drugs and Crime, UN Congress on the Prevention of Crime and Treatment of Offenders, and INTERPOL.

Chapter 11 – Regional Legal and Institutional Options

Chapter 12 surveys legal models and institutional vehicles at the regional level. Again, the survey is divided between laws and institutions and each of these is subdivided into general, marine, environmental and criminal justice groupings. It finds that regional institutions that might be willing to develop and adopt soft law instruments to progress the universalisation of enforcement jurisdiction against MLR crimes instruments are the: Forum Fisheries Agency, South East Asia Regional Plan of Action, Caribbean Environment Program, and the Economic Community of West African States.

PART I

CONCEPTUAL AND LEGAL ISSUES: HARMS, CRIMES, JURISDICTION AND HARMONISATION

CHAPTER 2.

GLOBAL MARINE LIVING RESOURCES HARM

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MLR SCOPE

Geographical Scope

The geographical scope of marine living resources addressed here means resources present in the marine environment, which extends across all oceans, seas, semi enclosed seas that form part of the Earth's salt water bodies. It excludes rivers, lakes, glaciers, ice flows or other fresh water bodies. Simply put, this means the range of jurisdictions for which jurisdictional powers and norms are prescribed under the United Nations Convention on the Law of the Sea. These include the high seas and all zones of national jurisdiction (the exclusive economic zone and continental shelf) or national sovereignty (internal waters, territorial sea and archipelagic waters) up to the low-water mark or the fresh water boundary.

Biological Scope

The biological scope of living resources includes ecosystems, organisms, specimens of organisms and the genetic material of organisms. An ecosystem means 'a dynamic complex of plant, animal and microorganism communities and their nonliving environment interacting is a functional unit'.¹ Organisms may come from the plant or animal kingdom or from archaea. (The latter being single cell organisms identified late in the 20th century as the third branch of life with a different chemistry from either plants or animals.) Specimens include parts of organisms no longer living and derivatives thereof.² Genetic resources means material containing functioning units of heredity of actual or potential value.³

¹ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 1.

² *Ibid.*

³ *Ibid* art 2.

MLR HARMS OF GLOBAL SIGNIFICANCE

Target stocks overexploitation

Wild capture fisheries comprise the component of marine living resources with the highest direct economic value and which are most commonly extracted from the marine environment.⁴ An example of harm to a harvested stock arises when the targeted species is endangered and its capture is prohibited, in which case the harvesting activity is often described as poaching. Harm to a MLR targeted and allowed for harvest may be caused also by fishing in excess of the total allowed catch (or without any quota). Fishing in a closed area or during a closed season or beyond the allowed period of time could harm the future reproductive capacity of the stock. Similarly, fishing with non-permitted fishing gear might result in a high proportion of undersize, juvenile catch, with detrimental effect to the targeted MLR stock.

MLR by-catch

Bycatch signifies MLR not directly targeted for capture but that nevertheless are captured in a harvest operation. The operation might have been directed towards other species or to other age groups in the species stock. As it comprises a waste of effort in the harvest operation, it is usually unintentional, caused by factors that range from poor intelligence to inappropriate equipment to operational mismanagement.

Sometimes bycatch is intentional, however. For example, when a nontarget species co-mingles with the target species, bycatch of the nontarget species during harvesting of the target species and might cause harm. For example, targeting dolphin because they are known to associate with yellowfin tuna results in intentional dolphin bycatch in yellowfin tuna harvests. Similarly, inefficiencies or reductions in return-for-effort caused to fishing operations by the techniques available to avoid bycatch of non-targeted species may incline fishers to avoid those techniques. For example, the inconveniences of having to use streamers, night fishing and thawed baits to discourage seabirds from snagging themselves on hooks in longline tuna fisheries, can incline fishers to deliberately fail to use those techniques.

Biological resources loss

The unauthorised harvesting of marine genetic resources also poses significant potential losses. The harm here is not to MLR but to the economic opportunities otherwise available to coastal States having the exclusive economic rights over those resources.

Management system degradation

MLR harvest management systems intended to be used in fisheries operations and designed to provide natural resources information and vessel compliance feedback to governmental managers are essential component of sustainable MLR management. For example, a fishing vessel master's misreporting of the area of recent fishing activity, or the master's failure to repair a fishing vessel satellite transponder, might not in themselves deplete the fishery but could contribute the mismanagement of the fish stock, especially if those actions were replicated by others in the fishery. Disruption of such MLR systems undermines both the natural resources knowledge base and the operational oversight of governmental managers of MLR. It systemically harms sustainable MLR management.

Environmental pollution and ecosystem disruption

Contaminants in the marine environment that cause detriment to uses of it can emanate from a range of sources, traditionally classified under the UN Convention on the Law of the Sea as: land-based, vessel sourced, dumped waste and offshore installed sources.⁵ Of these, land-based sources of marine pollution comprise by far the largest contributor, at over 80% by volume of marine pollution, including watershed and riverine discharges and direct waste discharges, such as sewage and industrial waste, and aerially transported contaminants, such as smog drift.⁶ The next largest source of pollution emanates from vessels, mostly resulting from operational discharges such as from the release of bilge water (rather than accident or misadventure) directly into sea water but also through the atmosphere.

Pollution has been found to cause harm to MLR in local pollution hotspots, such as bays and harbours where direct discharges dominate, which cause diseases and flesh lesions in fish, as well as at broad scale levels, such as through global warming and acidification of seawater which detrimentally impacts, inter alia, coral reef health. Historic and widespread continuing use of the marine environment as a waste sink means that such pollution is generally an accepted although unintended way of coastal living and an unfortunate but legal cost of industry. Only the most extreme acts of marine pollution might lack social approbation. Massive acts of pollution such as the despoliation of natural resources as a means of warfare, the dumping of contaminated wastes

⁴ In 2010, wild capture fisheries amounted to 88.6 million tonnes of fish. The estimated total value of wild capture and aquaculture production for 2010 was \$217.5 billion. FAO, *The State of World Fisheries and Aquaculture 2012*, 4 < <http://www.fao.org/docrep/016/i2727e/i2727e.pdf> >

⁵ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) part XII.

⁶ *Oceans and the Law of the Sea – Report of the Secretary-General*, 59th sess, Agenda item 50(a), UN Doc A/59/62/Add.1 para 97.

and dynamiting of biodiversity rich marine habitats, seem to be considered so extreme as to be culpable. This suggests that the intentional destruction of MLR habitats and ecosystems is a category of MLR harm considered to be criminal in nature.

MLR HARMS AS INTER-STATE LEGAL CONCERNS

International importance

Among the many different types of crimes against laws for natural resources management, marine living resources crimes are a category of fundamental international importance. Oceans comprise 72% of the earth's surface, produce 15-20% of humanity's food protein, contain the vast majority of Earth's life species, and - centrally relevant to discussion of international crime - their natural resources and maritime spaces are shared across all national jurisdictions.

International standards

Global and regional legal measures to promote compliance with international MLR conservation standards and to prevent MLR crime are already in place and too numerous to list here. The notion of universalising that law enforcement jurisdiction to suppress international MLR crime is another incremental step to strengthen existing global and regional measures. Its modest innovation is to make the logical connection between breaches of laws and criminal law enforcement cooperation in the context of international MLR management.

Shared natural resources

The ways in which marine living resources may be shared are many and varied. A distinct biomass of fish, for example might be shared because it is located in the high seas, or is located across national maritime boundaries, or is highly migratory or a combination of these factors. In addition, that species might be of international concern because of its scientific interest or a 'charismatic' status, or because the health of that fishery has indirect ecosystemic impacts elsewhere in other jurisdictions.

Shared spaces

The notion of universalised criminal jurisdiction under a treaty regime to enforce MLR law is particularly useful to complement Flag State jurisdiction on the high seas, i.e. in international areas where, otherwise, only Flag States would have legal jurisdiction to penalise their vessels for failing to meet international MLR conservation norms. Unfortunately, many Flag States are neglectful in ensuring such compliance.

Shared governance capacity

In the exclusive economic zone, where coastal States exercise sovereign rights, universalised criminal jurisdiction to enforce against MLR crime might also provide a useful complement to coastal State enforcement capacity, as many coastal States lack the capacity to effectively enforce their own MLR conservation laws across large maritime spaces. Even further inshore, coastal States might conceivably allow foreign States to assist enforcement of MLR conservation laws in their own territorial waters, subject to safeguards to protect coastal State sovereignty.

Transnational actors

Another reason for international concern over MLR crime is that the criminal actors typically operate beyond the jurisdiction of any one State alone. The actors in major MLR crime are multinational in composition and operate transnationally.

CHAPTER 3.

CRIME

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The concept of crime has its roots in the perpetration of injustice. Yet the exact boundaries of justice and of crime are not precisely defined. Indeed, they are continually being debated and constantly evolving, taking on new shapes in response to new circumstances.

Justice itself is an ancient notion but it is not fixed or static. Some of Its religious connotations are indicated in the book of Deuteronomy, which evidences a sophisticated development of the concept of justice by the sixth century BCE and in Aristotle's Nicomachean Ethics in the third century BCE. Two and a half thousand years later, new celebrated legal scholarship on the subject is still emerging.⁷ Discourse concerning the nature of justice is perennial.

Similarly, the boundaries of crime are still expanding and new concepts of crime developing. The mid-20th century saw the concise expression of notions of crimes against humanity and the late 20th century the development of notions of transnational crime, environmental crime and cybercrime. This report explores a new frontier for crime. Within the sphere of environmental crime, the early 21st century could see the maturation of the notion of universalised crime against the environment.

Terminologies used to describe crimes are often confusing. A preliminary task here is to set the specific meanings for the different terms used when defining the notion of crime. In identifying specific meanings, it becomes possible to distinguish between different types of crimes and to explore for each their respective constituent parts. This will help avoid confusion when distinguishing the concept of crime against MLR from other conduct and exploring its components and elements.

One of the reasons why it is important to define a clear common terminology is that universalisation of concepts of crime requires bridging disparate global cultures. Understandings of crimes are deeply rooted in the specific cultural contexts of the societies in which they occur. Each society has its own variation on what is considered right or wrong, each has its own individual legal system, and each uses slightly different words to signify the legal aspects of crime.

CRIME ELEMENTS

A basic conception of criminal law is that a specified conduct is formally obligated or prohibited by an effective authority that impartially punishes breaches of the obligation or prohibition. The component notions of specified conduct, formal obligation or prohibition and punishment of breaches are briefly examined here to sharpen our understanding of MLR criminal law.

⁷ See scholars such as John Rawls *Theory of Justice* (3rd edn) 1999 Harvard University Press.

Conduct obligations

In relation to the formal obligation or prohibition, the law may mandate that a person undertake an action or it may prohibit a specified action. For example, it may mandate that ballast water be cleaned before it is discharged into the waters of a port or it may prohibit entry into port by a vessel that has its hull fouled by pest organisms.

Accordingly, the specified conduct is to do something or not to do something, i.e. active or passive. A breach of an obligation would be a crime of omission, whereas a breach of a prohibition would be a crime of commission. It is the vessel master's failure to take action to clean ballast water, as compared to the act entering port with a fouled hull that comprises the breach. The human conduct comprises the breach and contributes in part to any actual harm caused by exotic pests in the vessel's ballast water or by pests fouling the hull.

The notion of impartial punishment of breaches of the law presumes that the prescribing authority has the capacity to monitor conduct and to punish identified breaches effectively. This presumption is more accurate in urban spaces, where there private citizens in dense human populations inform law enforcement officials situated nearby of breaches of the law, than in ocean spaces where there are few other private vessels to provide information and fewer public law enforcement vessels. When legal breaches are identified at sea, punishment may be meted out via several distinct processes.

Sanctions

As governmental regulation has burgeoned, so have the types of sanctions and processes for addressing breaches of regulations. Their range and diversity seems to be limited only by the imagination of the time. Although the distinctions between sanctioning processes are not always clear, they can be categorised as criminal, civil or administrative. Types of sanctions include death, imprisonment, fines, fees and other financial penalties, confiscations, compensation, bans, deregistration, suspensions, community service, enforceable undertakings, injunctions, withheld benefits, negative publicity, apologies, and so on. Within Anglophone legal systems, the terminology used to describe the wide variety of sanctions for crimes is often confusing and is sometimes inconsistent.

The characterisation of the sanctions as criminal, rather than as administrative or civil, is important within the context of international cooperation to combat MLR crime. MLR crimes are generally minor offences for which administrative or civil sanctions and processes apply. Most international law enforcement cooperation frameworks are designed to address serious criminal offences, rather than administrative or civil offences. Indeed, serious criminal offences are defined in international instruments as those for which the penalty is a maximum term of imprisonment of at least one year (or four 4 in other cases). This means that MLR crimes do not currently cross the threshold set by most jurisdictions for criminal law enforcement cooperation. Therefore, universalising MLR crimes would require that they be redefined as serious criminal offences.

Civil Sanctions

A 'civil penalty' can be described as one that is 'imposed by courts applying civil rather than criminal processes.'⁸ Most commonly civil sanctions consist of monetary fines,⁹ which can be imposed on both personal and corporate bodies, but can also extend beyond punishment to include imposition of corrective behaviour activities and the payment of compensation. A vessel may be confiscated as an instrument of crime or as part of a penalty for the principal crime.

Civil proceedings generally take place in a court (rather than an administrative tribunal) before an independent judge. They involve lower standard of proof at which facts must be established than criminal processes, generally being the balance of probabilities or else reasonable satisfaction, rather than proof beyond a reasonable doubt. Civil proceedings allow witnesses to be compelled to give evidence, facilitate evidence gathering through disclosure processes, and allow for a wider range of possible parties to the case. Reversal in the onus of proof, to place the burden of proof upon the defendant rather than the State once the State has made out an initial case is also more common in civil than in criminal proceedings. Thus, the civil proceedings result in less of procedural safeguards for the defendant than the criminal process.¹⁰

Administrative Sanctions

Administrative sanctions can be understood as penalties imposed by a regulator or some other enforcement body that is a government executive agency, 'without intervention by a court or tribunal.'¹¹ Administrative sanctions can include imposition of fines, fees, taxes, infringement notices and orders to pay compensation, as well as loss of licenses, permits, allowances or privileges. Notionally, these sanctions are intended to ensure the prevention of further damages rather than to penalise and abrogate rights.¹²

⁸ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) [2.45].

⁹ Ibid [2.50].

¹⁰ Ibid,[2.80].

¹¹ Ibid [2.64].

¹² European Commission, *Study on Measures Other Than Criminal Ones in Cases Where Environmental Community Law has not Been Respected in a Few Candidate Countries*, 6, <http://ec.europa.eu/environment/legal/crime/pdf/cd_summary_report.pdf>

Given the fact that administrative penalties generally result from the 'mechanical' or 'automatic' imposition of statutorily determined sanctions, they do not involve a judge at first instance and there are few procedural elements.¹³ Instead, judicial review is usually available to a complainant to correct any fault in the legal authority, required procedure or natural justice applied in the administrative process. Challenges to administrative penalties can result defaults to both criminal and civil proceedings for breach of regulatory provisions.

Criminal Sanctions

Criminal sanctions are punishments imposed by courts for breaches of criminal law. Generally, punishments impose a fine or imprisonment, with imprisonment being within the exclusive jurisdiction of criminal law. Some jurisdictions may also extend the scope of criminal sanctions to include the death penalty, corporal punishment and the confiscation of goods or assets. The convicted person acquires the stigma of a criminal record.

Criminal sanctions are distinguished by their enforcement procedures, which are relatively formal.¹⁴ For example, criminal offences are required to be before a court presided over by a judge and, depending on the offence and jurisdiction, a jury. A prosecutor must tender evidence that proves beyond a reasonable doubt that the accused intended and did commit the prohibited conduct.¹⁵ Most importantly, criminal procedural rights benefit the accused, including the presumption of innocence, prohibition on self-incrimination, the right to silence, the rights not to be tried twice for the same alleged crime or for a retrospective crime.

The available literature suggests that the differences between criminal, civil and administrative sanctions lie within the procedures used to implement them. The main distinguishing feature between criminal, civil and administrative sanctions is arguably the unique nature of the criminal trial. Meyer defines non-criminal sanctions in international law as, 'penalties for conduct proscribed under international criminal law, which have been imposed by civil courts, administrative agencies of other law enforcement authorities outside of a criminal trial.'¹⁶ For Meyer the criminal trial itself is the sole identifier for whether a sanction is criminal or not.

Coupled with this is the fact that the processes involved prior to non-criminal sanctions being imposed differ greatly. Criminal sanctions require police authorities to investigate criminal behaviour and gather evidence. Within administrative processes the investigation of breaches occurs on a lower evidentiary standard, presumptions of innocence generally do not exist and in the cases of corporations, regulations may require cooperation with competent authorities. In addition to this, a significant difference between administrative and criminal sanctions regarding the freezing of assets, is that the presumption of innocence within criminal procedures is not found within case law regarding administrative sanctions.¹⁷ What this suggests is that criminal, civil, and administrative sanctions, can be distinguished by the different principles and rights afforded within each process.

Criminal actors

Persons who break the law are sometimes termed criminals or offenders and we tend to imagine them as they stand accused in the dock in a trial court. Yet some accused not have no leg to stand on but are not human. In the case of fishing operations, the defendant might be a shelf company directed by other companies.

A 'legal person' is the formal term for a person having rights and responsibilities before the law. A legal person can be a human being, i.e. a natural person, or a constructed entity. A corporation is a constructed entity that is a legal person having rights and responsibilities before the law. As it is, in essence, merely an association of human beings, therefore its conduct is attributable to the persons comprising it, i.e. its personnel, who provide human agency and may be sanctioned for the company's regulatory breaches. However, given that corporations do have independent legal responsibilities as legal entities, they can also have criminal responsibility for their employee's actions.

During the last quarter of the 20th century, it became more often accepted practice to attribute criminal responsibility to corporations and to prosecute not only the directors but also the company itself. Corporations can be subject to vicarious criminal liability and to direct criminal liability. Vicarious criminal liability tends to address civil and administrative offences of a less serious nature and for which the penalties are fines. These offences concern non-compliance with prescribed standards for corporate conduct, such as those addressing occupational health and safety, employee benefits and workplace harassment. Corporate direct criminal liability concerns more serious crimes, such as manslaughter, conspiracy, price-fixing and theft. For example, the Commonwealth of Australia Criminal Code 1995 provides in relation to all offences that it applies to corporations in the same way as to natural persons.¹⁸

In relation to crimes for which a mandatory jail sentence is the prescribed penalty, such as murder, there is no point in prosecuting a legal entity, as a corporation cannot serve a jail sentence. Yet if other penalties than jail are also prescribed, then the corporation

¹³ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) [2.87].

¹⁴ Ibid [2.71].

¹⁵ Ibid [2.73].

¹⁶ Frank Meyer, 'Complementing Complementarity,' (2006) 6 *International Criminal Law Review* 549, 552.

¹⁷ Melissa van den Broek, Monique Hazelhorst and Wouter de Zanger, 'Asset Freezing: Smart Sanction or Criminal Charge?' (2010) 27 *Utrecht Journal of International and European Law* 18, 25.

¹⁸ *Commonwealth Criminal Code 1995* (Cth) ss 12.1-12.6.

itself might be prosecuted usefully. Indeed, some jurisdictions have enacted legislation that provides that, if imprisonment is the only punishment prescribed, then a fine may be imposed on a corporation nevertheless. Also, where a fine is the prescribed criminal punishment for a natural person, then a higher a fine may be imposed on a corporation for the same offence.¹⁹

Questions concerning corporate criminal responsibility remain around which of a corporation's personnel can be identified with the corporation itself, and also the circumstances in which their actions can be attributed to the corporation itself. Less senior employees may attract corporate vicarious criminal liability, so long as they act within the scope of their employment, whereas more senior personnel, particularly directors, executives and senior officers, who comprise the 'mind' or alter ego and culture of the company, may attract its direct criminal liability.²⁰

Ancillary crimes

Complicit conduct that supports a principal offence may be proscribed as an ancillary crime. Ancillary crimes can occur prior, during or after the principal offence.

Those criminalised conducts that occur prior to the principal offence include conspiracy, preparation, counselling, procuring and attempt, whereas aiding and abetting occur during the principal offence, as compared to those criminalised conducts that occur after, including concealment, misprision and participation as an accessory after the fact. A major focus of contemporary law enforcement effort is to combat money laundering, which is an ancillary crime that involves concealing the proceeds of the principal crime.

When a principal MLR crime occurs within a country's jurisdiction, then it has jurisdiction over the ancillary crimes also, if it has legislated to prescribe the complicit conduct as ancillary crimes. Some complicit conduct, such as foreign procurement of illegal fishing equipment or forged documentation, may occur in other countries. Therefore, the reach of national MLR laws prescribing ancillary crimes could extend extraterritorially.

For example, in establishing a monitoring, control and surveillance system for foreign fishing, a coastal State might require that bunker vessels providing fuels to vessels fishing in its exclusive economic zone must submit records within 24 hours to the coastal fishery management authority detailing the identity, type and position of each the receiving and the bunkering vessel, the type and quality of fuel, the time of bunkering and the name and owner of the master of each. If illegal fishing by a vessel were to occur, non-reporting or false reporting by the bunkering vessel would be an ancillary offence.

UNIVERSAL CRIMES

When international law prohibits specified conduct by an individual person and enables States or international organisations to impose a criminal sanction to enforce the prohibition, then that prohibited conduct is a universal crime. It is individual behaviour that is prohibited directly by international law.

Historically, international law prescribing a universal crime is embodied in customary international law. In modern times, treaty law has the principal role in defining criminal conduct and universalising international efforts for its suppression. The approach taken in international crime suppression treaties requires that States enact laws proscribing the specified conduct and enforce those laws. Therefore, the criminal conduct is a breach of national laws coordinated internationally through a treaty, rather than a direct breach of international law itself. Nevertheless, if State participation in a crime suppression treaty is so widespread as to be virtually universal and the participating States actually implement its obligations, then the treaty obligations can be regarded as reflecting a new rule in customary international law. In that case, the treaty rule has evolved into customary international law and the conduct criminalised under the rule can be regarded as a universal crime directly against international law. Until such time as the treaty rule becomes customary, the rule might be regarded as universalising a specified crime but not yet as a universal crime.

Therefore, an important distinction is drawn between crimes against customary international laws and crimes against national laws prescribed by treaties. Crimes prohibited by customary international laws and crimes prohibited by treaties are both "international crimes" but only crimes prohibited by customary international law may properly be termed "universal".²¹ The accepted categories of customary international crimes are a few: war crimes, crimes against humanity, genocide and piracy. Therefore, even in relation to aspects of the status of these, considerable controversy remains. The universal status of a purported international crime might be contested even though its international status is recognised.

¹⁹ L. Waller and CR William, *Criminal Law Texts and Cases* (Butterworths, 10th ed, 2005) 14, providing examples of *Crimes Act 1914* (Cth) s 4B(3) and *Crimes Act 1900* (NSW) s 360(A).

²⁰ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Law Book Company, 2001) 154, citing *Tesco Supermarkets Ltd v Natrass* 1972 AC 153.

²¹ Neil Boister, 'Transitional Criminal Law?' (2003) 14(5) *European Journal of International Law* 953, 963.

Universalised crimes

The freer movement of people, money, goods and services creates opportunities for criminals. At least a quarter of all terrorist attacks are coordinated across international borders. Money-laundering worldwide is estimated by the International Monetary Fund to be equal to approximately 2-5% of global GDP. Human trafficking in 4 million people every year earns US\$ 5-7 billion. In addition, narcotics and firearms trafficking, smuggling, fraud, cybercrime, paedophile tourism, natural resources poaching and trade in illegal waste form growing areas are entrepreneurial growth areas. These crimes are generally termed transnational crimes.

In response, national criminal laws are being extended extraterritorially, leading to a multiplicity of international jurisdictional interactions and need to adapt national criminal laws most relevant to transnational so as to facilitate international coordination. During each negotiation of a criminal law enforcement coordination treaty, successfully reaching consensus on the definition of a transnational crime is another step globalising criminal law.

The nature of the crimes defined in new law enforcement coordination treaties is most often transnational but not necessarily so. In addition to transnational crimes, there is growing international consensus on the internationalisation of other forms of international crime. Accelerated globalisation in the late 20th century in the fields of communications, technology, commerce, travel and culture is influencing national legal cultures. Outside of transnational treaty crimes are other classes of crime protecting specifically designated human rights (proposed as being universal) by prohibiting crimes against those human rights. Therefore, new notions of international crimes are emerging, only some of which are transnational crimes.

All treaty crimes can be regarded as international crimes, in that they are internationally harmonised and in the process of becoming universalised. Until such time as the treaties are virtually universally ratified and the relevant provisions implemented, such that they become customary international law, their defined crimes remain only treaty crimes. They are not yet universal but are international crimes in the process of being universalised.

CHAPTER 4.

JURISDICTION

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Jurisdiction refers to a State's authority to prescribe and enforce its municipal law. It is a disjunctive concept encompassing a State's jurisdiction to prescribe, as distinct from its jurisdiction to enforce.²² In a criminal law context, prescriptive jurisdiction refers to a State's authority to criminalise certain conduct, whilst enforcement jurisdiction refers to its authority to actually apply sanctions implementing those laws. However, prescriptive and enforcement jurisdiction are inherently linked, as a State's legitimate enforcement of a law must be predicated on its valid authority to criminalise the conduct in question.²³

Under international law a State has wider scope to prescribe laws than it does to enforce them. This is due to the limitations of sovereign equality and non-intervention. These principles allow States to prescribe their laws as they see fit,²⁴ but restrain their enforcing of those laws extraterritorially. As the U.S. Third Restatement of Foreign Relations Law puts it, 'officials of one State may not exercise their functions in the territory of another State without the latter's consent.'²⁵ It is therefore clear that whilst a State may undertake enforcement measures within its own territory, international law will prevent it from initiating arrests, commencing investigations or punishing individuals within the territory of another State. National enforcement jurisdiction under international law is primarily territorial.²⁶

UNIVERSAL JURISDICTION

Universal jurisdiction refers to the State's exceptional right to prescribe and enforce international law against any person engaged in an offence directly against international law, in those circumstances where international law itself prescribes a crime and allows all States to enforce it. Such power to enforce is held by the law enforcement authorities of all countries and is applicable unilaterally against offenders of any other country.

There is controversy as to the premise and reach of universal jurisdiction. In relation to its premise, controversy surrounds whether universality is based in the extraordinarily grave character of the crime – so to automatically permit any States to take extraterritorial enforcement action, or whether universality is based in international consensus on jurisdictional exceptionalism – as the prerequisite to allow extraterritorial enforcement action. The former enables universal jurisdiction to be exercised against any extraordinarily grave crime. Thus, universal jurisdiction is 'criminal jurisdiction based solely on the nature of the crime.'²⁷ In contrast, the latter premise creates a prerequisite of inter-State consensus concerning the exercise of extraterritorial jurisdiction over particular designated crime.

²² Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 736.

²³ Karinne Coombes, 'Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations' (2011) 43 *The George Washington International Law Review* 419, 424.

²⁴ This is of course provided that municipal laws do not contravene international law, see O'Keefe, above n 1, 740.

²⁵ Restatement (Third) of the *Foreign Relations Law of the United States* (1987)

²⁶ Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 740.

²⁷ Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* (2001) 23
<http://www.princeton.edu/~lapa/unive_jur.pdf>

As universal jurisdiction is essentially extraterritorial in its prescriptive aspects, the enforcement aspects might also be expected to require extraterritorial reach. However, because State enforcement jurisdiction is fundamentally territorial, the principles of sovereignty and non-intervention limit the abilities of national authorities to enforce any laws extraterritorially. This has led some commentators, such as O'Keefe and Commbes to suggest that universal jurisdiction is simply shorthand for universal *prescriptive* jurisdiction.²⁸ Put another way, '[i]n practical terms, the gap between the existence of the principle and its implementation remains quite wide.'²⁹

The controversy over the reach of universal jurisdiction stems from divergent views on whether an enforcing State need have any other connection with the crime, such as physical custody over the accused or impact upon its population or economy. Such controversies over the premise and reach of universal jurisdiction have relevance to whether MLR crimes can be regarded as universal crimes, as explored below.

Piracy

The concept of universal jurisdiction evolved in relation to action to combat piracy on the high seas. As no State can exercise national territorial jurisdiction on the high seas, law enforcement against foreign vessels engaged in piracy would transgress against foreign Flag State jurisdiction, unless authorised by the relevant foreign Flag State.

The custom emerged among European countries that any State may wield enforcement powers against pirate vessels, even when those vessels are not within the territorial jurisdiction of the enforcing State and the crime of concern has not been committed within its territorial jurisdiction. Thus, the instance of piracy need have no direct physical or economic connection with the enforcing State. The rationale of universal jurisdiction over piracy is that all seafaring States share an indirect interest in suppressing potential attacks against vessels, seafarers cargoes or other mercantile interests at sea where none of them can exercise territorial jurisdiction. Accordingly, the custom developed that allowed the exercise of law enforcement against piracy on the high seas was based upon common agreement by Flag States.

The emergence of consensus concerning the exercise of universal jurisdiction over piracy on the high seas might be regarded as inherent in the extraordinarily grave nature of the crime: pirates are regarded as hostile to all, *hostis humani generis*, and therefore subject to forceful suppression by all countries. On the other hand, the limitation of intervention to the high seas indicates that the exercise of universal jurisdiction against piracy is premised upon the absence of any territorial jurisdiction enabling States otherwise to impose law enforcement in that geographical space. Given that not all piracy may involve severe or extreme violence,³⁰ it is the common international interest in establishing an enforcement regime to fill the jurisdictional vacuum on the high seas, rather than the extraordinarily grave nature of the crime, that forms the more persuasive rationale for international legal consensus to exercise universal jurisdiction in relation to it.

The custom allowing universal jurisdiction to suppress piracy crystallised in the formal agreement of States to combat piracy under the United Nations Convention on the Law of the Sea, article 100, which provides that:

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

The Convention specifically allows the forceful exercise of law enforcement powers upon pirate vessels under article 105:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board... [italics added]

The exercise of law enforcement powers is permitted against vessels engaged in piracy, even though pirate vessels retain the nationality and notional protection of their Flag State. For example, if the crew of a warship or other governmental ship mutinies and takes control over the vessel in order to engage in piracy, the naval or governmental vessel is nevertheless regarded as a pirate ship and is subject to seizure by any State.³¹

The articulation within the Convention on the Law of the Sea of inter-State agreement to exercise universal jurisdiction against piracy provides an alternative basis of authority to custom in international law to take enforcement action. When its antipiracy provisions were formulated during the 1970s, decolonisation was posing challenges by newly independent countries to the established Euro-centricity of customary international law. Crystallisation of the customary rule with the then new 1982 Convention

²⁸ Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 745.

²⁹ Xavier Phillippe, 'The Principle of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?' (2006) 88 *International Review of the Red Cross* 375, 379.

³⁰ Actual violence is not a necessary feature in a practical or a legal terms. *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 101, defines piracy as consisting of "...any illegal acts of violence or detention, or any act of depredation, committed for private ends..."

³¹ Ibid art 102 - 103. The Convention provides that "the retention or loss of nationality is determined by the law of the State from which such nationality was derived" (Article 104.).

ensured its continuity. The Law of the Sea Convention is currently ratified by 166 parties, most of them developing countries, therefore providing ongoing support for this extraordinary exercise of extraterritorial jurisdiction.³²

Lack of common procedure

The exercise of universal jurisdiction to suppress piracy is conducted at the discretion of the enforcing State. There is no common international procedure. Article 100 of the Law of the Sea Convention simply provides:

... The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to ships, aircraft or property, subject to the rights of third parties acting in good faith.

For example, the United States statute criminalising piracy, provides that '[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.'³³ The prosecution of suspected pirates is predicated on the individual being located within the territory of the United States.

This lack of a coordinated criminal procedure can provide challenges when pirates are apprehended in far distant waters by international forces. In the Gulf of Aden, where Somalia-based pirates have attacked many foreign flagged commercial vessels over the past decade, naval operations have been conducted against pirates by warships of over 20 different countries. These navies have coordinated their operations through combined taskforces (e.g. Combined Task Force 151, Combined Task Force 152, Operation Atalanta). However, this coordination has been principally in relation to military assets, rather than law enforcement.

Apprehended pirates have been arrested and prosecuted by the law enforcement authorities of diverse countries, including: France, India, the Netherlands, and USA. Procedures, for the detention, prosecution, trial and punishment of pirates have not been coordinated³⁴ and some countries may be unable or unwilling to conduct prosecutions under their own national laws. Therefore, ad hoc arrangements have been put in place to facilitate prosecutions by East African regional countries, such as Kenya, Somalia, Tanzania Mozambique, the Maldives, et cetera, each under their own laws and jurisdictions.³⁵

This use of national prosecution procedures on an ad hoc basis reflects the lack of a common procedure for national courts exercising universal jurisdiction. Neither customary international law nor the United Nations Convention on the Law of the Sea establish a consensus for a common platform on which to conduct detentions, arrests, prosecutions, trials or sentencing. It is apparent then that exercises of universal jurisdiction can produce very disparate outcomes, depending upon the legal culture of each State enforcing its laws.

Humanitarian crimes

The customary exercise of universal jurisdiction against the crime of piracy provided a precedent for the exercise of universal jurisdiction as a basis for law enforcement against other types of crimes. Principally, these are humanitarian crimes, such as war crimes, crimes against humanity and genocide.

The 1949 Geneva Conventions oblige their High Contracting Parties to try any person, regardless of nationality, who commits a war crime.³⁶ These crimes are defined as committing or ordering grave breaches of the conventions:

wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transport or unlawful confinement of a protected person, compelling a person to serve on the forces of a hostile power, willingly depriving a protected person of the rights of fair and regular trial prescribed in the present convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and want only.³⁷

In response, the United Kingdom's *Geneva Conventions Act* (s1), for example, provides that:

"any person, whatever his nationality, who, whether in or outside the United Kingdom" commits a grave breach of the Conventions, is guilty of an offence".³⁸

This allows the UK jurisdiction over grave breaches of the Geneva Conventions irrespective of where the crimes were committed or the nationality of the perpetrator. The Conventions do not expressly use the words 'universal jurisdiction,' yet it is clear that the UK is asserting extraterritorial jurisdiction over breaches of the Geneva Conventions.

³² UN Division of Ocean Affairs and Law of the Sea http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm.

³³ *Piracy and Privateering Act*, 18 USC § 1651 (1994).

³⁴ Eugene Kontorovich (2010) 'A Guantánamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists' 98(1) Cal L. Rev. 243; (2004) The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation 45(1) Harv. Int. L. Jnl 183.

³⁵ UN Office on Drugs and Crime *Counter Piracy Programs: Support to the Trial and Related to Treatment of Piracy Suspects* (Issue 11, March 2013) http://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_wv.pdf

³⁶ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, art 146.

³⁷ Ibid art 147.

³⁸ *Geneva Conventions Act 1957* (UK) s 1.

Virtually all countries have ratified the four 1949 Geneva conventions, reflecting universal acceptance of their precepts, including their universalisation of criminal jurisdiction over war crimes. Accordingly, universal jurisdiction over war crimes has evolved, from a treaty commitment between the parties, to become customary international law based upon universal treaty practice. The International Committee of the Red Cross, in its study on customary international humanitarian law, considers that States now have under customary international law the right to vest universal jurisdiction in their national courts for the prosecution of war crimes.³⁹

In addition to war crimes provisions under the Geneva conventions, other treaties seek to universalise criminal jurisdiction over war crimes and other crimes perceived as exceptionally grave. The Convention on the Prevention and Punishment of the Crime of Genocide 1948, provides that:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to ... provide effective penalties for persons guilty of genocide...⁴⁰

and that

persons charged with genocide ... shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction ...⁴¹

The Rome Statute of the International Criminal Court has elaborated and expanded upon some of the war crimes identified under the 1949 Geneva Conventions and their First Additional Protocol of 1977 but also given fresh meaning to the concept of universal crimes against humanity. The jurisprudence of contemporary International Criminal Tribunals for Yugoslavia and for Rwanda have also articulated new precedents by drawing upon these treaties and other legal sources to expand contemporary conceptions of war crimes and of crimes against humanity.

Beyond war crimes, genocide and crimes against humanity, the *Convention Against Torture* requires that all parties take such measures 'as may be necessary' to establish criminal jurisdiction over torture offences in cases, where the alleged offender is present in its territory. The treaty is currently ratified by 153 States, representing over three quarters of United Nations members, but subject to a significant number of reservations by its parties.⁴² Although this means that its provisions cannot yet be confidently regarded as articulating customary international law rules of universal jurisdiction, international tribunals have judged that customary international law articulates torture as a universal crime when it occurs in the context of armed conflict or a crime against humanity.⁴³

Ad hoc national law enforcement

Current practice suggests that many States will enforce universal jurisdiction for humanitarian crimes only over people already located within their territory.⁴⁴ Reydamas explains that, of the few cases prosecuted on the basis of universal jurisdiction, all defendants 'without exception' had been located within the territory of the prosecuting State, many of them having taken up permanent residency.⁴⁵ The International Commission for the Red Cross has found that, in at least sixteen States, legislation predicated on universal jurisdiction requires the perpetrator to be present within the State's territory.⁴⁶

In the case of piracy on the high seas, no State has territorial jurisdiction over the maritime space, but an enforcing vessel is considered as a piece of floating territory.⁴⁷ In the case of humanitarian crimes most crimes would be committed where people live, i.e. within the territory of the State most affected. Therefore, the Fourth Geneva Convention, on the protection of civilian persons (article 146), provides that the a party

... may, if it prefers, hand such persons [who have committed grave breaches] over to Another High Contracting Party concerned, provided that such High Contracting Party has made out a 'prima facie' case...

Thus, if Another High Contracting Party can make out an apparent case that the crime was committed on its territory or by its citizen, then other parties may hand over that alleged offender.

³⁹ International Committee Of The Red Cross, *Customary International Humanitarian Law. Rule 157 Jurisdiction over War Crimes* <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule157>

⁴⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 9 December 1951) art.5.

⁴¹ Ibid art 6.

⁴² United Nations Treaty Collection, *Status of Convention against Torture* <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en>

⁴³ For example, see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Mertis)* [2012] ICJ Rep 144, 99.

⁴⁴ Fannie Lafontaine, 'Universal Jurisdiction – the Realistic Utopia' (2012) 10 *Journal of International Criminal Justice* 1281.

⁴⁵ Luc Reydamas, 'The Rise and Fall of Universal Jurisdiction' in William Schabas and Nadia Bernaz (eds), *Handbook of International Criminal Law* (Routledge, 2010) 337, 348.

⁴⁶ Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, UN Doc A/66/93 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/380/74/PDF/N1138074.pdf?OpenElement>>

⁴⁷ *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10.

Similarly, the Convention against Torture provides for the State exercising universalised jurisdiction to prosecute in circumstances where the offender is present in its jurisdiction, if it does not extradite the offender for prosecution by another more closely associated country (e.g. of the offender's nationality or where the crime occurred). Thus, the function of universal jurisdiction to enforce against humanitarian crimes provides a net to ensure that the accused does not escape prosecution despite misfeasance by States with a direct territorial or nationality connection to the offender. It offers a complementary exercise of enforcement powers, secondary to enforcement by States having a more direct connection to the crime.

Limitation of universal jurisdiction to a complementary role gives States some assurance that the law enforcement powers it makes available concerning alleged breaches of humanitarian norms will not be readily vulnerable to misuse by unfriendly foreign powers. The need for this assurance arises from the centrality of humanitarian issues to political conflict and the ambiguities in definitions of humanitarian crimes that lend themselves naturally to political causes. Enactment of laws in some European countries to liberally facilitate prosecution of humanitarian crimes on the basis of universal jurisdiction in the first years of the 21st century was followed immediately by the manipulation of those same laws to initiate political prosecutions and abuses of criminal process.⁴⁸

Some States, however, do not require any direct connection with the criminal conduct or even custody over the accused at the time of trial in order to prosecute, i.e. They allow trials for crimes based on universal jurisdiction to proceed *in absentia*.⁴⁹ Coombes asserts that 'whether it is unlawful to enforce international criminal law *in absentia* remains a matter of the municipal law of the enforcing State.'⁵⁰ Nevertheless, the legality of trials *in absentia* under international law is far from clear. President Guillaume of the ICJ in the *Arrest Warrant* case gave a damning judgement on universal jurisdiction *in absentia* stating it was 'unknown to international conventional law.'⁵¹ He made further criticisms of the practice, even stating that, except for a limited core of crimes, 'international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.'⁵²

However, it is clear that perpetrators need not be present within the territory of the prosecuting State for pre-trial procedures to take place.⁵³ Investigations, evidence gathering, and the issuing of arrest warrants, can all take place without the perpetrator being present within the prosecuting State's territory.⁵⁴ Issues of extraterritorial evidence collection, political pragmatism and municipal practice may still make this difficult in some States.

For national courts, issues may also arise from their concurrent criminal jurisdictions over the same crime by the same offender. Conflicting assertions of jurisdiction are resolved ad hoc on the basis of comity between the States. There is no applicable rule in customary international law and usually no treaty formula that sets out priority between them.

The United Nations Model Treaty on the Transfer of Proceedings in Criminal Matters, adopted in 1990, provides a framework that could assist States interested in negotiating bilateral or multilateral treaties on the transfer of proceedings in circumstances where they have concurrent jurisdiction. It provides that a party may request another party to take over the criminal proceedings "if the interests of the proper administration of justice so require"⁵⁵ and that when criminal proceedings are pending in two or more states against the same suspected person in respect of the same offence, "the states concerned shall conduct consultations to decide which of them alone should continue the proceedings".⁵⁶ Thus, it provides a process for arranging transfer but is most useful only in cases where the State that has commenced the trial with the offender in custody does not wish to proceed or two or more states have agreed which one of them will proceed. The European Convention on the Transfer of Proceedings in Criminal Matters is the most ratified treaty on this matter of low a significant number of bilateral treaties have been adopted.

International tribunal procedure

In contrast to national authorities, it can be argued that the problems of limitations on extraterritorial enforcement jurisdiction on the basis of universal jurisdiction do not apply to international judicial bodies or tribunals.⁵⁷ This is due to the fact that they are often created by treaty regimes that construct an autonomous international enforcement authority, independent of national territory.⁵⁸

⁴⁸ See, for example, the Belgian law on universal jurisdiction: Stefaan Smis and Kim Van der Borght 'Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives' <http://www.asil.org/insigh112.cfm>.

⁴⁹ This was the case in France where thirteen Chilean officials were convicted *in absentia* for crimes committed under the Pinochet regime. Karinne Coombes, 'Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations' (2011) 43 *The George Washington International Law Review* 419, 437.

⁵⁰ Ibid.

⁵¹ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] sep. op. Guillaume, 9.

⁵² Ibid.

⁵³ Fannie Lafontaine, 'Universal Jurisdiction – the Realistic Utopia' (2012) 10 *Journal of International Criminal Justice* 1281, 1284.

⁵⁴ Ibid 1284.

⁵⁵ *Model Treaty on the Transfer of Proceedings in Criminal Matters*, GA Res 45/118, art1.

⁵⁶ Ibid art 13.

⁵⁷ Bantekas argues that "in a very broad, non-legal, sense they [international criminal tribunals] exercise the *raison d'être* of universal jurisdiction; i.e. that international crimes should not go unpunished and that all States have a right to prosecute." Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 352.

⁵⁸ Ibid.

In regards to the Nuremburg International Military Tribunal, the US Court of Appeal in the decision of *Demjanjuk v. Petrovsky* held that “it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction.”⁵⁹ In contrast, however, modern international criminal tribunals have been created by mechanisms of the United Nations Charter, or multilateral treaty regimes. Such bodies cannot be said to exercise customary universal jurisdiction as “[t]heir competence is derived from their constitutive instruments and is not at all restricted by the jurisdiction principles and constraints applicable to municipal courts.”⁶⁰

This is true of the International Criminal Tribunal for Rwanda (ICTR) as well as the International Criminal Tribunal for the Former Yugoslavia (ICTY), which were created by the UN Security Council acting under Chapter VII of the UN Charter. It is also true of the International Criminal Court, which gains its jurisdiction from the Rome Statute, developed under the auspices of the UN General Assembly. Part Five of the Rome statute sets out investigations and prosecutions provisions that integrate common law and civil law legal cultures to develop a universal International procedure. While none of the international judicial bodies can be said to exercise ‘universal jurisdiction’ of the type customarily exercised by States, they are recognised as playing an important role in the enforcement of international criminal law.⁶¹

The argument that an international judicial tribunal’s enforcement jurisdiction is as limited as the exercise of universal jurisdiction by the individual States that themselves create it misses a fundamental point, i.e. that the international criminal tribunal has jurisdiction under new treaty terms agreed between States. They are products of interstate agreements to universalise criminal law by expressly allowing expansive enforcement jurisdiction in specified circumstances, despite the stricter limitations they otherwise require of themselves for exercises of extraterritorial enforcement jurisdiction.

Although an international criminal tribunal derives its jurisdiction from States, the tribunal’s constitutive instruments grant it expanded law enforcement agency. The parties allow the tribunal to exercise a carefully defined and delimited enforcement jurisdiction that extends across their multiple national territories in order to prevent criminal impunity. However, the tribunal’s prosecution powers are strictly controlled and limited within the compass of agreed crime categories, prosecutorial procedures and controls by the tribunal’s governing body of member states. For example, the International Criminal Court is constrained to a complementary jurisdiction that comes into operation only upon default in the proper exercise of its own humanitarian law enforcement obligations by a State that otherwise has jurisdiction.

Concurrent jurisdiction and complementarity

The establishment of international judicial bodies to prosecute perpetrators of international crimes creates potential for conflict between national and international courts each with jurisdictions over the same crime. Customary law is silent on the issue of which court should take precedence.⁶² Therefore, treaty regimes establishing an international court or tribunal have resolved this issue either by vesting the court with primacy or creating a relationship between the courts on the basis of complementarity.⁶³

The ICTY and ICTR were granted primacy over national courts. This regime was established “because of an anticipated failure of national courts to address the crimes,”⁶⁴ and once national courts began to regain legitimacy the ICTY sent some cases back to national courts for prosecution.⁶⁵ The need for primacy in the ICTY and ICTR regimes was also based also the fear of biased proceedings where adversaries were brought before such courts.⁶⁶ Whilst anticipated impunity is a justification for the primacy of international forums, it is at odds with principles of State sovereignty and non-intervention. This was less of an issue for the ICTY and ICTR as they were ad hoc tribunals arising from a single conflict.⁶⁷ The ICTY Statute states:

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.⁶⁸

For the permanent International Criminal Court (ICC), however, primacy over national courts was not acceptable. Instead, the Rome Statute set out a regime of ‘complementarity’⁶⁹ that provides that only if national courts are ‘unwilling’ or ‘unable’ to

⁵⁹ 776 F.2d 571, 582 (6th Cir. 1985) in Kenneth Randall, ‘Universal Jurisdiction Under International Law’ (1988) 66 *Texas Law Review* 785, 805.

⁶⁰ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 352.

⁶¹ *Australian Views on the Scope and Application of the Principle of Universal Jurisdiction*, UN Doc A/65/181, <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Australia.pdf>

⁶² Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 348.

⁶³ *Ibid.*

⁶⁴ *Ibid* 525.

⁶⁵ *Ibid* 530

⁶⁶ *Ibid* 349.

⁶⁷ *Ibid* 525.

⁶⁸ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 9.

⁶⁹ *Ibid* art 1, 17.

prosecute certain crimes “may the International Criminal Court step in to remedy the deficiencies resulting from the failure of one or more States to fulfil their duties.”⁷⁰ The Rome Statute provides that the Court’s jurisdiction is “secondary to that of national courts.”⁷¹ As such, the ICC would be precluded from prosecuting a crime where a national court has taken sufficient efforts to ensure justice.

⁷⁰ Mohammed Zeidy, *Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishes, 2008) 4.

⁷¹ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 429.

CHAPTER 5.

UNIVERSALISED CRIMINAL JURISDICTION FOR CRIMES OF GLOBAL CONCERN

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The categories of universalised crimes are going through a period of rapid expansion. The two decades bookending the turn of the 21st century have seen an increasing number of global treaties adopted that seek to address exceptionally grave crimes by coordinating international action against them. The types of crimes currently addressed by these treaties are dominated by those entailing violence against the individual or undermining governments. They can be classified into three groups: political violence, trafficking or smuggling, and organised crime.

It is only a matter of time until natural resources crimes emerge as a category of crime of global concern. Unsustainable practices leading to local and regional collapses in natural resources that provide food and essential environmental services can have severe ramifications in human insecurity and political instability. Where these unsustainable practices breach national or international standards, and amount to criminal conduct, it is inevitable that international mechanisms for natural resources criminal law harmonisation and cooperative enforcement will be developed.

What is it that makes each of these existing categories of crime an international concern? For the most part, they each require that an international element be in place in order for the harmonised crime prescription provisions to apply. Usually, the crime may be required to be perpetrated by persons of one nationality but in the territory of or against the vessels, government or nationals of another country, as is the case for hijacking aircraft. In relation to piracy, the crime must be perpetrated beyond national territory. Less often, the crime need have no direct international dimension but is considered sufficiently grave or shocking for dedicated international coordination to support its suppression. This is the case for genocide in some circumstances, and for torture.

If the harm is an international concern, then States may harmonise their definitions of it as a crime under their national laws. In effect, this universalises the crime. A factor limiting universalisation, however, is that most instruments have not achieved unanimous ratification and implementation such as to be regarded as evidencing customary international law. Therefore, whether customary international law has evolved to produce rules defining a particular crime as truly universal remains a subject for jurisprudential debate.

The following sections of this report investigate the legal implications of universalising criminal law enforcement jurisdiction to suppress international MLR crime. The multifaceted connections between universalised criminal law enforcement and international MLR conservation in a multitude of maritime spaces by multinational vessels and crews suggests that the universalisation of MLR crime law enforcement is more legally complicated than for most other crimes of international concern. Although it is a logical step to connect breaches of MLR management laws and criminal law enforcement cooperation, its legal and practical complexity is apparent. Categories of global crimes of concern and their respective treaty instruments are examined below for analogues to better appreciate considerations in the formulation of universalised jurisdiction to suppress international MLR crime.

HARMONISATION OF CRIME DEFINITIONS

Global treaties that universalise follow a common structural pattern. Each of the universalising instruments identifies the area of proscribed criminal activity, harmonises criminalisation, and then facilitates crime suppression cooperation activities. In identifying the general area of crime to be universalised, each treaty defines the area of proscribed criminal activity in general terms and then defines more specifically the circumstances in which the treaty applies and the specific criminal acts of concern.

The two fundamental areas of crimes harmonised are political violence and organised crime. In relation to political violence, torture and certain acts of terrorism are defined and prescribed for criminalisation. The defined acts of terrorism include kidnapping diplomats, hijacking of aircraft, acts of violence against aircraft, airports, maritime platforms and vessels at sea, as well as bombings, and the financing of terrorist acts. In relation to organised crime, criminalised acts include slave trading or trafficking in people, migrant smuggling, trafficking in narcotics, trafficking in arms, illegal broadcasting, bribery, corruption, participating in an organised crime group, obstruction of justice and money laundering.

International harm

Violence to the individual is the principal harm caused by conducts broadly categorised here as political violence and organised crime that have mobilised States to negotiate and adopt treaties to combat them. Violence to the individual is apparent in relation to torture, terrorism and trafficking in people but violence is also indirectly caused by smuggling migrants, drugs and weapons. Yet not all crimes of international concern need entail violence. Crimes that threaten the capacity of the State to govern are also the subjects of international coordination. International efforts to combat organised crime, corruption, obstruction of justice and the laundering of criminal proceeds are also coordinated under crime prevention treaties.

Depredation upon MLR undermines the ability to manage them sustainably. Therefore, MLR crimes fall squarely into the category of threatening the capacity of the State to govern its maritime spaces and resources. Yet is that enough to connect MLR crimes to international political concern? The question remains whether this particular area of crime is related closely enough to international political concern to warrant universalised legal action?

Transnational Link: Political violence, Organized crime

The following analysis seeks to discern whether crimes of international concern already universalised under United Nations treaties display a pattern that is shared by MLR crimes. If so, those MLR crimes could be articulated through treaties that harmonise MLR crime definitions and coordinate criminal law enforcement jurisdiction.

The fact that treaties adopted through the United Nations to combat crimes of violence and subversion of government are adopted at all means that they do address an international concern. Yet, the individual relationships with the international concern are not uniform. The nature of their links to a particular international concern varies within an identifiable pattern. Usually, the link is one of the following formulae:

- (1) The crime occurs in whole or part in an international space, beyond any national jurisdiction;
- (2) The crime crosses national boundaries, occurring in more than one national jurisdiction;
- (3) The perpetrators combine more than one nationality; or
- (4) The crime is so grave as to shock the conscience of all humanity.

In the first three instances listed, a transnational element is present engaging more than one national jurisdiction. In contrast, in the latter instance, no transnational element is necessary.

Many international conventions that relate to terrorism apply the same 'formula'. They define a particular act as an offence, identify a transnational factor required to be present, oblige States that may be directly affected by the offence (commonly through the presence of the alleged offender) to enact legislation or establish jurisdiction to punish the offender under their criminal laws, or else to extradite such a person to a State that will punish the offender.

For example, under the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970*, the place of take-off or the place of the actual landing of the aircraft needs to be located outside the territory of the State of registration of that aircraft in order for the Convention to apply (*Article 3, paragraph 3*). Similarly, in relation to drug trafficking under the *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, while no transnational link is specifically outlined in the Convention, the need for States to establish jurisdiction before they either extradite or prosecute the alleged offender, and the requirement that a party have jurisdiction to request extradition, implies that a transnational link is required for the Convention to operate.

The *UN Convention Against Transnational Organised Crime 2000* applies to the prevention, investigation and prosecution of offences established in accordance with the Convention only where the offence is transnational in nature. An offence is transnational in nature if;

- (a) It is committed in more than one State;

- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one state but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

The nature of MLR crime is that it often involves a vessel that operates beyond the boundary of the flag state, is owned in another country, managed in yet another, uses officers and crew of diverse nationalities, and lands its catch in the ports of yet other States. It is apparent that MLR crime involves harms that are predominantly transnational in nature and that fit the pattern of relationships with international concern and could be articulated through a treaty that harmonises the definition of MLR crime, so as to universalise jurisdiction over it.

No Transnational Link Required: Torture and Corruption

The international link giving rise to global concern set out in the fourth category above, i.e. the crime is so grave as to shock the conscience of all humanity, is different nature. Its shocking nature, rather than its occurrence across national boundaries or international spaces, is what generates international concern over it. Other than torture, there are few examples of such internationalised crimes of shocking nature.

The *Convention Against Torture* 1984 provides the universalised jurisdiction in Article 5, as follows:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 [i.e. torture] in the following cases:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State;
 - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall *likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him* pursuant to article 8 to any of the States mentioned in paragraph 1 of this article. (*emphasis added*)

As provided for in paragraph 2, States parties to the Convention against Torture must prosecute the alleged torturer if that person is present within their territorial jurisdiction, irrespective of the nationality of the offender or the victim or of where the torturer occurred. That is, the crime of torture is universalised by treaty, without the requirement that the offence has a transnational link to the prosecuting State.

The crime of torture would appear to be uniquely qualified to transcend the transnational link requirement due to its ability to shock the conscience of humanity. However, the more mundane crimes associated with corruption have been universalised also without the requirement for a direct transnational link. Treaty provisions requiring the criminalisation of corruption under the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and under the 2003 United Nations Convention on Transnational Organised Crime each require a transnational link to the country exercising criminal law enforcement jurisdiction, but the 2003 United Nations Convention against Corruption (UNCAC) does not.

The 2003 United Nations Convention against Corruption internationally harmonises the definition of corruption but does not require that there be a transnational corruption link across jurisdictions in order for the definition and the Convention's consequent enforcement provisions to apply. That is to say, it can apply entirely within one State's territorial jurisdiction. Chapter 3 of the Convention requires each State party to criminalise the offering or soliciting of bribes by national public officials (art 15); embezzlement by public officials (art 17); money laundering (art 23), and the obstruction of justice (art 25) even though there is no international connection involved.

The fact that corruption was designated in 2003 as an internationalised crime, although it does not shock the conscience of humanity and there may be no transnational link involved in its set of circumstances, indicates that the boundaries on defining international crimes set in the 20th century are falling away. The range of crimes that might potentially be internationalised is growing beyond its traditional categories.

LAW ENFORCEMENT COOPERATION

Offences proscribed by criminal law should be enforced. Universal harmonised prescription of a crime must be complemented by universal law enforcement. As observed above, other than the Convention against Torture and UNCAC, treaties that universalise crime definitions usually apply only if there is a transnational link to the enforcing State. Therefore, enforcement of an international crime usually involves transnational connections and requires international law enforcement cooperation.

The law enforcement cooperation activities between parties required to enforce the universalised crime varies with the circumstances of the crimes and terms of the treaties. Usually, they provide at least a basis for extradition, require States to provide assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offence, and oblige States to cooperate to prevent the offence occurring. In the case study of law enforcement cooperation against transnational organised crime in Chapter 6, the three pillars of international law enforcement cooperation are discussed in depth. For present purposes, it is essential to note only that they comprise: information exchange, prosecution or extradition, and institutional capacity building.

CONCLUSION

States, by negotiating terms agreed through a legal instrument, can commit to adopt laws under their national jurisdiction to criminalise recognised MLR crimes. Their universalised prescription of MLR crime operates through their national laws, rather than being directly prohibited under international law. International harmonisation of the definition of MLR crime transforms it into a universalised, but not always universal, crime.

Marine Living Resources crimes typically involve vessels that cross national maritime spaces and have flags, operators, owners and crews that are variously foreign to Coastal and Port States, which is to say that they have multiple transnational linkages. The harms that they do threaten the capacity of Coastal States to govern maritime spaces and resources sustainably. These international linkage and national threat factors suggest that illegal harms to MLR are a suitable, indeed typical, subject area for universalisation of criminal laws. The growth in numbers of crime suppression treaties in recent decades and trends in their subject matters indicate expansion in the limits on defining international crimes. There is no conceptual obstacle to negotiation of an international instrument to harmonise the definition of certain MLR crimes and to coordinate national criminal law enforcement jurisdictions, hence universalising such MLR crimes.

PART III

CASE STUDIES:

**INTERNATIONALLY COORDINATED MLR LAW
ENFORCEMENT STRATEGIES**

TRANSNATIONAL CRIMINAL ENFORCEMENT

UNILATERAL LONG-ARM ENFORCEMENT

PORT MARKET STATE MEASURES

HIGH SEAS BOARDING

CHAPTER 6.

TRANSNATIONAL LAW ENFORCEMENT COOPERATION

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TRANSNATIONAL CRIME AT SEA

Crime at sea is a growing international concern. The UN General Assembly annual Resolution on Oceans and the Law of the Sea makes reference an increasing number of times each year to the importance of combating maritime crime in its various forms.⁷² In 2012, the Resolution 67/78 recognised the problem in its preamble:

Noting with concern the continuing problem of transnational organized crime committed at sea, including illicit traffic in narcotic drugs and psychotropic substances, the smuggling of migrants and trafficking in persons, and threats to maritime safety and security, including piracy, armed robbery at sea, smuggling and terrorist acts against shipping, offshore installations and other maritime interests, and noting the deplorable loss of life and adverse impact on international trade, energy security and the global economy resulting from such activities...⁷³

It went on to say in an operational paragraph that the General Assembly:

113. Recognizes the importance of enhancing international cooperation at all levels to fight transnational organized criminal activities, including illicit traffic in narcotic drugs and psychotropic substances, within the scope of the United Nations instruments against illicit drug trafficking, as well as the smuggling of migrants, trafficking in persons and illicit trafficking in firearms and criminal activities at sea falling within the scope of the United Nations Convention against Transnational Organized Crime....⁷⁴

⁷² Resolution Adopted by the General Assembly on 11 December 2012, GA Res 67/78, UN GAOR, 67th sess, Agenda Item 75(a), UN Doc A/RES/67/78 (11 December 2012), the latest resolution, makes reference nine times. See also Resolution Adopted by the General Assembly On 24 December 2011, GA Res 66/231, UN GOAR, 66th sess, Agenda Item 76(a), UN Doc A/RES/66/231 (24 December 2011) and Resolution Adopted by the General Assembly on 7 December 2010, GA Res 65/37, UN GAOR, 65th sess, Agenda Item 74(a), UN Doc A/RES/65/37 (7 December 2010)

⁷³ Ibid.

⁷⁴ Ibid.

It is noteworthy that the annual UNGA Resolution on Oceans and the Law of the Sea makes no specific reference to MLR crime. UN General Assembly Resolution 67/79 on Sustainable Fisheries does make a specific reference to illegal fishing in one paragraph, where it cautiously states that the General Assembly:

68. Also notes the concerns about possible connections between transnational organized crime and illegal fishing in certain regions of the world, and encourages States, including through the appropriate international forums and organizations, to study the causes and methods of and contributing factors to illegal fishing to increase knowledge and understanding of those possible connections, and to make the findings publicly available, and in this regard takes note of the study issued by the United Nations Office on Drugs and Crime on transnational organized crime in the fishing industry, bearing in mind the distinct legal regimes and remedies under international law applicable to illegal fishing and transnational organized crime...⁷⁵

The first such resolution was adopted in 2008,⁷⁶ making the mention by the UN of organised crime in the MLR context a relatively recent development. Most recently, in 2013, the UN Office on Drugs and Crime produced a paper that specifically addresses fisheries crimes and marine pollution crimes as forms of transnational organised crime.⁷⁷

The upward limit of the territorial sea is 12 nautical miles from the coastline. Crimes at sea are often transnational, in that they cross the maritime boundary lines of national territory. MLR crimes are typically transnational for the same reason. In addition, MLR crimes may sometimes qualify as also being other forms of maritime crime. As is illustrated below, MLR crimes can often be organised crime. Less often, MLR crime might also overlap incidentally with another form of maritime crime, such as people trafficking, when foreign fishers are taken on-board under conditions of slavery.⁷⁸ Additionally, other forms of transnational crime might be engaged in incidentally when MLR crimes are committed, for instance when the proceeds of the MLR crime are laundered, or when the activity is facilitated by the corruption of public officials, or the administration of justice is obstructed.

The following study commences with a review of the tools of international law enforcement cooperation that are critical to practical efforts to combat MLR crime and then analyses the intersections between MLR crime and other transnational crime that are already prohibited under international treaties.

LAW ENFORCEMENT COOPERATION

International criminal law enforcement rests upon three pillars of international cooperation: information exchange, extradition or prosecution, and institutional capacity building.

Information Exchange

The exchange of information between law enforcement agencies occurs both informally and formally. Informal exchanges may occur on a cross-institutional basis or at a person-to-person level to provide information on illegal activity, or for use as criminal intelligence or financial intelligence concerning pending and past crimes. Formal exchanges occur through a State's central legal authority to provide official information that can be admitted into court as evidence.

Intelligence on non-compliance and crime

In order to take action against international, transnational and transboundary crime, law enforcement agencies require detailed information on criminal activity.⁷⁹ The United Nations Secretary General has noted that “[t]he production of intelligence requires the collection, collation and analysis of a wide range of information on the persons and organizations suspected of being involved in organized criminal activity.”⁸⁰ This necessitates the collection and analysis of vast amounts of material from a wide range of sources

⁷⁵ Resolution Adopted by the General Assembly on 11 December 2012, GA Res 67/79, UN GOAR, 67th sess, Agenda Item 75(b), UN Doc A/RES/67/79 (11 December 2012). See also Resolution Adopted by the General Assembly on 6 December 2011, GA Res 66/68, UN GOAR, 66th sess, Agenda Item 76(b), UN Doc A/RES/66/68 (6 December 2011) and Resolution Adopted by the General Assembly on 7 December 2010, GA Res 65/38, UN GAOR, 65th sess, Agenda Item 74(b), UN Doc A/RES/65/38 (7 December 2010) and Resolution Adopted by the General Assembly on 4 December 2009, GA Res 64/72, UN GAOR, 64th sess, Agenda Item 76(b), UN Doc A/RES/64/72 (4 December 2009).

⁷⁶ Resolution Adopted by the General Assembly on 5 December 2008, GA Res 63/112, UN GAOR, 63rd sess, Agenda Item 70(b), UN Doc A/RES/63/112 (5 December 2008).

⁷⁷ UN Office on Drugs and Crime *Combatting Transnational Organised Crime at Sea – Issue Paper* (2013).

⁷⁸ UN Office on Drugs and Crime *Transnational Organised Crime in the Fishing Industry - Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drugs Trafficking* (2011).

⁷⁹ UNSOC, *Strengthening Existing International Cooperation in Crime Prevention and Criminal Justice, Including Technical Cooperation in Developing Countries, With Special Emphasis on Combating Organized Crime* E/CN.15/1992/4/Add.2 6 March 1992 [34] <<https://www.ncjrs.gov/pdffiles1/Digitization/145576NCJRS.pdf>>

⁸⁰ UNSOC, *Strengthening Existing International Cooperation in Crime Prevention and Criminal Justice, Including Technical Cooperation in Developing Countries, With Special Emphasis on Combating Organized Crime* E/CN.15/1992/4/Add.2 6 March 1992 [35] <<https://www.ncjrs.gov/pdffiles1/Digitization/145576NCJRS.pdf>>

and has led to the creation of international law enforcement cooperation agencies such as INTERPOL whose mission statement is 'to securely communicate, share and access vital police information.'⁸¹

The difficulty in gathering intelligence is indicated by analogous problems that arise under the data reporting systems required by many treaty regimes in order to determine compliance. As Morjin notes with respect to human rights violations, '[m]any reports that are submitted contain such limited information that it is not possible for treaty bodies to give useful recommendations without significant further research.'⁸² In fact, many states fail to report at all, largely due to a lack of resources or ability to collect and report data on the incidence of criminal activity.⁸³

Financial intelligence

In accordance with the recommendations of the OECD Financial Action Task Force (FATF), most countries have established a national Financial Intelligence Unit responsible for collecting financial data relevant to criminal law enforcement. The global nature of money laundering requires international cooperation in order to enforce anti-money laundering law. This is demonstrated by the publicly documented case of Franklin Jurado, who laundered \$36 million through more than '100 accounts, in 68 banks, in nine countries' in order to make assets 'appear to be of legitimate origin.'⁸⁴ Intergovernmental law enforcement cooperation includes the exchange of financial data between states, as well as traditional criminal investigations by competent agencies, prosecutions, and sanctions.⁸⁵

Mutual legal assistance

Information that is admissible in a court to provide to prove an alleged fact is called legal evidence. The UNODC defines mutual legal assistance, as 'a process by which States seek and provide assistance in gathering evidence for use in criminal cases.'⁸⁶ Without the existence of mutual legal assistance arrangements between states, the ability to combat transnational, transboundary and universal crimes would be an impossible task.

The principally territorial nature of states enforcement jurisdiction means that a State seeking to prosecute a crime committed wholly or partly outside of its territory can compel the gathering of evidence and undertaking of investigations only within its own jurisdiction. Where evidence exists outside of a state's territory, law enforcement agencies must approach foreign authorities in the appropriate jurisdiction for voluntary assistance. As there is no entitlement to such assistance under customary international law, access to 'evidence located in a foreign jurisdiction must be predicated on appropriate agreements of a general nature or ad hoc arrangements.'⁸⁷ Arrangements for Mutual legal assistance arrangements therefore play a vital role in international criminal law, as the successful prosecution of transnational or international crimes is clearly contingent upon the cooperation of the states involved.⁸⁸

Traditionally, mutual legal assistance in international criminal matters was carried out through diplomatic channels by letters of rogatory.⁸⁹ This process involved the issuing of a letter by a judge or other public official addressed to their counterpart in a foreign jurisdiction that requested particular measures be undertaken in order to secure evidence.⁹⁰ While letters of rogatory are still undertaken today, States have opted to expedite this process under other arrangements, varying with the nature of the assistance sought⁹¹ and the diplomatic and political relationship between the two States. The most common arrangements are multilateral and bilateral treaties and enabling domestic legislation.⁹²

Article 1 of the UN's Model Treaty on Mutual Assistance in Criminal Matters outlines the range of assistance that may be included in MLA agreements.⁹³ These include:

⁸¹ INTERPOL, *Vision and Mission* < <http://www.interpol.int/About-INTERPOL/Vision-and-mission> >

⁸² John Morijn, 'Reforming United Nations Human Rights Treaty: Monitoring Reform' (2011) 58(3) *Netherlands International Law Review* 295, 303.

⁸³ Ibid.

⁸⁴ UNGA, *Special Session on the World Drug Problem* <<http://www.un.org/ga/20special/featur/lauder.htm>>

⁸⁵ UNSOC, *Strengthening Existing International Cooperation in Crime Prevention and Criminal Justice, Including Technical Cooperation in Developing Countries, With Special Emphasis on Combating Organized Crime* E/CN.15/1992/4/Add.2 6 March 1992 [11] <<https://www.ncjrs.gov/pdffiles1/Digitization/145576NCJRS.pdf> >

⁸⁶ UNODC, *Manual on Mutual Legal Assistance and Extradition* <http://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf >

⁸⁷ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 355.

⁸⁸ Phillip Heymann, 'Concluding Remarks: Two Models of National Attitudes Toward International Cooperation in Law Enforcement' (1990) 31 *Harvard International Law Journal* 99, 99.

⁸⁹ Chat Le Nguyen, 'Towards the Effective ASEAN Mutual Legal Assistance in Combating Money Laundering' (2012) 15(4) *Journal of Money Laundering Control* 383, 387.

⁹⁰ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 356.

⁹¹ Asian Development Bank and Organisation for Economic Co-Operation and Development, *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, 27 <<http://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf>>

⁹² Chat Le Nguyen, 'Towards the Effective ASEAN Mutual Legal Assistance in Combating Money Laundering' (2012) 15(4) *Journal of Money Laundering Control* 383, 387.

⁹³ *United Nations Model Treaty on Mutual Assistance in Criminal Matters* art 1.

- (a) Taking evidence or statements from persons;
- (b) Assisting in the availability of detained persons or others to give evidence or assist in investigations;
- (c) Effecting service of judicial documents;
- (d) Executing searches and seizures;
- (e) Examining objects and sites;
- (f) Providing information and evidentiary items;
- (g) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.

Mutual legal assistance provisions are the norm in multilateral treaties dealing with international crimes.⁹⁴ For example, article 18 of the UN Convention against Transnational Organized Crime obliges states to 'extend the widest measure of mutual legal assistance in investigations' as well as requiring states to 'reciprocally extend to one another similar assistance' when parties have reasonable grounds to suspect that a transnational crime has occurred.⁹⁵

Despite the necessary role mutual legal assistance plays within international law, the process is not without difficulty. Each State has its own regulations regarding the collection of evidence for use in criminal proceedings. The techniques employed by one state to gather evidence may result in the evidence being declared inadmissible if used in a criminal trial within another jurisdiction. MLA agreements generally compensate for this by requiring States to comply with the procedures indicated by the state requesting the legal evidence, 'unless they are contrary to its fundamental principles of law.'⁹⁶ Differences in legal process between criminal trials in civil and common law jurisdictions have also posed challenges for the provision of mutual legal assistance. For example, Australia had to extend its definition of 'committal proceedings' to ensure it could provide assistance to European investigating magistrates engaged in pre-trial processes in civil law jurisdictions that do not require a committal proceeding and are not required to have an accused in custody.⁹⁷ It is clear that in order for mutual legal assistance to be effective, some flexibility within legal systems is required.

International courts and tribunals also need State cooperation in evidence gathering. The Statute of the International Criminal Tribunal for Yugoslavia, for example, obliges states to comply with requests for assistance from the Tribunal to identify and locate persons, take testimony and produce evidence, inter alia.⁹⁸ Similarly, the Rome Statute of the International Criminal Court contains an obligation for assistance that obliges states produce evidence, take testimony and execute searches when requested by the Court.⁹⁹ As with mutual legal assistance between states, cooperation in enforcement is vital to ensure the successful prosecution of international crimes.

Extradition or Prosecution

The principle of *aut dedere aut judicare*¹⁰⁰ recognizes the unique position 'custodial States' have in ensuring the enforcement of law¹⁰¹ and requires them either to prosecute an offender found within their territory, or to extradite the offender to a competent jurisdiction that will prosecute. The obligation to extradite or prosecute is therefore an important tool to ensure compliance with the provisions of multilateral treaties.

For example, the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation implements this principle, providing that:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.¹⁰²

This is the usual articulation of the principle of *aut dedere aut judicare*. Bantekas claims that the principle 'constitutes an obligation owed to the entire international community' and applies to 'the core international crimes,'¹⁰³ which would make it an equivalent to

⁹⁴ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 356.

⁹⁵ *United Nations Convention against Transnational Organized Crime* 8 January 2001, article 18.

⁹⁶ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 359.

⁹⁷ Dianne Stafford, 'Mutual Legal Assistance in Criminal Matters: The Australian Experience' (1991) 17 *Commonwealth Law Bulletin* 1384, 1386.

⁹⁸ *International Criminal Tribunal for the former Yugoslavia Statute*, art 29.

⁹⁹ UN General Assembly, *Rome Statute of the International Criminal Court* 17 July 1998, art 93.

¹⁰⁰ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 378.

¹⁰¹ Zdzislaw Galicki, *Preliminary Report on the Obligation to Extradite or Prosecute ("aut dedere aut judicare")* UN Doc A/CN.4/571 (7 June 2006) [10].

¹⁰² International Civil Aviation Organization (ICAO), *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177, art 7.

¹⁰³ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 379.

universal jurisdiction. Corell however distinguishes two forms of universal jurisdiction: universal jurisdiction 'stricto sensu' and 'universal jurisdiction based on the principle *aut dedere aut judicare*,'¹⁰⁴ which we have termed 'universalised jurisdiction.' Whilst these two forms have a 'close and mutual relationship'¹⁰⁵ they are 'conceptually distinct rules of international law.'¹⁰⁶

Organisational mechanisms

Treaty conference and secretariat

A treaty regime's peak decision making body (or Conference of Parties) and its Secretariat are multi-governmental organizations responsible together for the implementation and monitoring of treaty regimes. The Conference of Parties will usually have powers under its constitutive treaty to review and amend the treaty or its annexes. For example, changes to annexes listing protected species or conservation areas, listing restricted chemicals or vessels, or specifying MLR management standards to be enforced by criminal law could be regularly reviewed and revised by an MLR regime's Conference of Parties.

A Secretariat's role and the extent of its authority will usually be defined by the treaty regime itself and any subsequent protocols. The general function of secretariats is the day-to-day administrative tasks related to the treaty regime. However, some conventions afford significant enforcement powers to the secretariat and their role is fundamental to the effective implementation of the treaty. The 1982 Convention on the Conservation of Antarctic Marine Living Resources created a Commission with the authority to implement specific provisions of the Convention. For example, pursuant to Article IX, the Secretariat has direct responsibility over the facilitation of research, the compiling of data, the publishing of information, and the identification of conservation needs and measures.¹⁰⁷

Sharing forfeited criminal proceeds

Given the strictly territorial nature of state's enforcement jurisdiction, 'the enforcement of a confiscation order on the territory of another state is clearly at variance with international law.'¹⁰⁸ An established mechanism for sharing of forfeited criminal proceeds between states cooperating to combat money laundering and its predicate crime can therefore be a useful tool to promote cooperative efforts. The 2001 *UN Convention against Transnational Organized Crime* provides for the freezing and confiscation of assets. It requires parties to 'afford one another the widest measure of mutual legal assistance,'¹⁰⁹ and obliges 'international cooperation for purposes of confiscation.'¹¹⁰

The Convention also provides a mechanism by which confiscated assets can be shared with developing countries in order to ensure their implementation of the Convention. Article 30(2)(c) obliges States to create an account to deliver technical assistance, further outlining that:

States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to the aforementioned account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention.¹¹¹

Complaints reception and integrity monitoring

To demonstrate compliance with the provisions of a treaty, its parties are often required to submit detailed reports to a treaty Secretariat for distribution to the Conference of Parties. However, given the large number of treaty regimes that exist and the difficulties many States face in gathering data and allocating sufficient resources to generate reports, there is a significant incidence of non-reporting. Monitoring of treaties and the effectiveness of their implementation is significantly hampered, with figures demonstrating that 'only about 30-35 per cent of reports are submitted on time.'¹¹²

International complaint reporting mechanisms are deployed usually in the implementation of international human rights instruments. For example, Article 21 of the 1984 United Nations Convention against Torture provides a procedure for States to complain when another party 'is not fulfilling its obligations under this Convention.'¹¹³ This procedure allows the issue to be drawn

¹⁰⁴ Hans Corell, *Evaluating the ICC Regime: The Likely Impact on States and International Law* <http://untreaty.un.org/ola/media/info_from_lc/romestatute_dec00.pdf>

¹⁰⁵ Zdzislaw Galicki, *Preliminary Report on the Obligation to Extradite or Prosecute ("aut dedere aut judicare")* UN Doc A/CN.4/571 (7 June 2006) [31].

¹⁰⁶ Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, 2001), 11.

¹⁰⁷ *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982).art. IX.

¹⁰⁸ Guiy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) 382.

¹⁰⁹ *United Nations Convention Against Transnational Organized Crime*, opened for signature 15 November 2000, 40 ILM 335 (entered into force 29 September 2003).art18.

¹¹⁰ *Ibid* art 13.

¹¹¹ *Ibid* art 30(1)(c).

¹¹² John Morijn, 'Reforming United Nations Human Rights Treaty: Monitoring Reform ' (2011) 58(3) *Netherlands International Law Review* 302.

¹¹³ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 21.

to the offending State's attention and provides them with an opportunity to respond. Should the response be inadequate, other States may refer the issue to arbitration.¹¹⁴ The complaints mechanism within the Convention against Torture works to ensure the provisions of the treaty are complied with and provides a process by which a state's implementation of the treaty can be assessed.

MLR CRIME AS TRANSNATIONAL CRIME

Transnational crime can take many forms, including: trafficking in illicit substances (such as drugs and contraband, as well as hazardous wastes), trafficking in people and people smuggling, piracy, and terrorism. The practices particular to transnational crime syndicates reflect sophistication in organisational support activities, such as bribery, money laundering, obstruction of justice and participation in a criminal organisational structure. The following analysis focuses upon these organisational support activities as they are broad and general categories of crime applicable to a range of other illegal activities and, therefore, entail more frequent or a greater degree of overlap with MLR crime than do piracy, terrorism or dealing in illicit substances and people smuggling.

UN Convention on Transnational Organised Crime

The United Nations Convention against Transnational Organized Crime (UNTOC), adopted in 2000, addresses both the harmonisation of certain criminal laws of its parties and the facilitation of law enforcement co-operation between those parties. It applies to the prevention, investigation and prosecution of offences to be enacted by the Parties within their national jurisdictions in accordance with the Convention. CTOC applies to serious crime and also to four additional listed categories of crime.

Article 3. Scope of application

3.1. This Convention shall apply ... to the prevention, investigation and prosecution of: ...

(b) Serious crime as defined in article 2 of this Convention; ...

Where the offence is transnational in nature and involves an organized criminal group.

The CTOC extends broadly to 'serious crime', but only where the offence is transnational and involves an organized criminal group. This could cover transnational breaches of MLR conservation and management standards by organised crime syndicates. However, a substantial amount of MLR crime would fall beyond it, due to the three list qualifications: serious, transnational and organised criminal group. Of these three qualifications, to qualify as 'serious crime' might be the most problematic, for it involves offences which must carry a maximum penalty of at least 4 years imprisonment. Fisheries offences are not typically regarded as serious crimes attracting gaol sentences of at least four years. Serious crime is defined in the CTOC under Article 2. Use of Terms:

"Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty...

Similarly, Article 2 gives the intended meaning of an organised criminal group and of a transnational offence:

"Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention, in order to obtain, directly or indirectly, a financial or other material benefit...

It is arguable that fishing companies that deliberately engage in illegal fishing are organised criminal groups. Most would involve a group of three or more persons. The Convention does not require that the serious crime be the sole or even a principal aim of the organisation. If illegal fishing is a regular activity of the association, it may reasonably be regarded as a criminal group. However, whether a fishing company that obtains part of its revenue from MLR crime should be regarded as an organised criminal group is not settled.

Article 2 also defines the meaning of transnational:

An offence is transnational in nature if;

(a) It is committed in more than one State

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.

The reference in paragraph (a) to a transnational offence being committed in more than one State implies that it is committed within the State's territory, including its territorial sea. Thus, an MLR crime is transnational if it crosses a national border into another State's territorial waters. Yet, under international law, the MLR crime would not be committed of another State if it was committed in the exclusive economic zone or on the high seas, i.e. it would not be in more than one State and therefore not

¹¹⁴ Ibid art 21.

transnational in nature. Similarly, under paragraph (b), the MLR crime would not be transnational unless it was committed within the territorial waters of another State.

Nevertheless, an MLR crime that extends from the jurisdiction of one State into the exclusive economic zone of another or onto the high seas could still be committed by more than one State. For example, a marine fisheries company that fishes illegally in foreign territorial waters and has its registered office in one State, boats registered in another, holding companies for the boats registered elsewhere again and fishing crew from yet other countries could be described as an transnational organised criminal group that engages in criminal activities, under paragraph (c). Similarly, if the MLR crime has substantial effects in another State, it would be transnational within the meaning of paragraph (d). For example, fishing a straddling stock on the high seas and thereby depleting it within the adjacent exclusive economic zone, or fishing a highly migratory species with similar effect, if committed illegally would be a transnational crime. Illegality can occur by breach any of the national laws that apply to members of the group conducting the fishing, including even by under-declaring taxable income from the fishing operation.

It should be noted that the CTOC also requires that parties establish corporate liability, whether criminal, civil or administrative, in addition to the criminal liability of the natural persons who are principals of a corporation, for the commission of offences it requires to be proscribed.¹¹⁵ Therefore, companies themselves can be regarded as participants in an organised criminal group.

The four additional listed categories of crime that CTOC requires its Parties to criminalise, if the activities are transnational in nature and involve an organized criminal group, are:

- participation in an organised criminal group (art 5);
- laundering of the proceeds of crime (art 6);
- corruption (art 8); or
- obstruction of justice (art 24).

Each of these criminal activities (i.e. participation, money laundering, corruption and obstructing justice) are offences that may occur incidental to but are in fact typically encountered to some degree in the commission of MLR crimes. Therefore, the convention has extensive applicability to MLR crime, if the offences are transnational and involve an organised criminal group.

Pursuant to Article 15.1, each State Party is required to adopt measures to establish its jurisdiction over the offences established by the Convention when:

- (a) The offence is committed in the territory of that State Party; or
- (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time the offence is committed.

In addition, under Article 15.2 a State Party may (subject to Article 4, which relates the protection of sovereignty), at its own option, adopt measures to establish its jurisdiction over an offence when:

- (a) The offence is committed against a national of that State Party;
- (b) The offence is committed by a national of that State Party or a state-less person who has his or her habitual residence in its territory; or
- (c) The offence is
 - a. Established in accordance with Article 5, paragraph 1 of the Convention [i.e. participation in an organized criminal group] and is committed outside its territory with a view to the commission of a serious crime within its territory; [or is]
 - b. Established in accordance with Article 6, paragraph 1 (b)(ii) of the Convention [i.e. laundering of proceeds of crime] and is committed outside its territory with a view to the commission of an offence established in accordance with Article 6 within its territory.

Each State Party may also adopt measures as necessary to establish jurisdiction over the offence when the alleged offender is present in its territory and it does not extradite him or her. If a State Party exercising its jurisdiction over an offence has been notified, or has otherwise learned that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions. (art 15)

Overall, Article 15 ensures a wide range of legal bases may be used to assert criminal jurisdiction over transnational organised crime. It recognises the broad legal bases available to States to assert their criminal jurisdiction over MLR crime, thereby reinforcing the international legal basis for universalising criminal jurisdiction over MLR crime.

¹¹⁵ Ibid art 10. Liability of legal persons: 1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention. 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. 4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

In relation to enforcement of the specified crimes, the CTOC set in place a range of obligations for international cooperation in law enforcement. These include requirements that the parties co-operate in the confiscation and seizure of suspect criminal assets (art 13), extradition of alleged offenders (art 16), provision of mutual legal assistance in prosecutions (art 18), and the exchange of information in criminal investigations and in criminal intelligence gathering (art 26-28). To enable the Parties' ongoing cooperation in implementation of their obligations, the CTOC establishes a Conference of Parties (art 32) and Secretariat (art33), which is provided by the UNODC.

OECD Bribery Convention and UN Convention Against Corruption

To facilitate the illegal provision of government permits to harvest, land, process or market MLR, enterprises may bribe government officials to fix the necessary documentation.¹¹⁶

Many transnational MLR crimes would be facilitated by acts offering bribery to foreign public officials. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention)¹¹⁷ applies to such situations, which commonly arise in the international fishing industry.

The OECD Bribery Convention addresses active bribery. Actively bribing is offering, promising or giving a bribe, regardless of whether it was requested (art 1). The actual bribe itself is defined as:

Any undue pecuniary or other advantage whether directly or through intermediaries ... in order that the official act or refrain from acting in relation to the performance of official duties in order to obtain or retain business or other improper advantage in the conduct of international business (art 1).

The meaning of a foreign country in the context of the OECD Bribery Convention includes 'all levels and subdivisions of government from national local' (art 1.4.b). A foreign public officials then means 'any person holding a legislative, administrative or judicial office of foreign country, ... any person exercising a public function for a foreign country, ... and any official or agent of a public international organisation' (art 1.4.a)

Under OECD auspices, a rigorous process of multilateral surveillance began in April 1999 to monitor compliance with the Convention and assess the steps taken by countries to implement it in national law. The Convention establishes an open-ended, peer-driven monitoring mechanism to ensure the thorough implementation of the international obligations that countries have taken on under the Convention. This monitoring is carried out by the OECD Working Group on Bribery which is composed of members of all State Parties. The country monitoring reports contain recommendations formed from rigorous examinations of each country.

On 9 December 2009, the 10th anniversary of the entry into force of the OECD Bribery Convention, the Parties adopted an OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions that set out additional measures to prevent, detect and investigate foreign bribery. These include making companies liable despite the use of agents and intermediaries; and improvements in the implementation of law enforcement cooperation, including by improving channels for reporting suspected foreign bribery, protecting whistleblowers and in better mutual legal assistance in investigations, prosecutions and the recovery of proceeds.

Overlapping subject matter occurs across many treaties. Concerning bribery and corruption, overlaps occur between the CTOC, the OECD Bribery Convention and the UN Convention Against Corruption. The United Nations Convention on Corruption ('UNCAC') was adopted by the United Nations General Assembly on 31 October 2003 and came into force on 14 December 2005.¹¹⁸ It encompasses bribery that is entirely domestic, such as: bribery of private business persons, and of persons holding influential political positions, such as political party officials, as well as the active bribery of foreign public officials covered by the OECD Convention.

CONCLUSION

The Convention on Transnational Organised Crime does not provide a systematic criminal law solution to the problem of global MLR crime. Its provisions concerning transnationalism were not formulated with maritime zones in mind. The result is that its application to crimes committed on the high seas or in exclusive economic zones is uncertain and haphazard. Further, there is the uncertainty as to how to balance a fishing company's legitimate and illicit activities so as to characterise it as a criminal organisation. Finally, the CTOC definition of serious crimes premised on a four-year minimum potential gaol sentence excludes most MLR crimes. The four other offences to be criminalised under the CTOC, - bribery, money laundering, obstruction of justice

¹¹⁶ Hanich Q. and Tsamenyi M.B. 'Managing Fisheries and Corruption in the Pacific Islands Region' (2009) Marine Policy 33, 386.

¹¹⁷ *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, opened for signature 17 December 1997, 37 ILM 1 (entered into force 15 February 1999). It currently has 38 parties. Although the OECD has only 30 members, non-members may ratify the Convention. http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html

¹¹⁸ *United Nations Convention Against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005) It currently has 140 signatories and 143 parties. <http://www.unodc.org/unodc/en/treaties/CAC/index.html>

and participation in an organised criminal group - are not required to also be serious crimes and are offences that often occur in association with MLR crime. Yet, these offences are also required to be transnational and to be conducted by organised criminal groups, raising the uncertainties mentioned above. Some bribery and corruption aspects of MLR crime are in the process of being harmonised under other treaties but not in a substantively consistent or globally universalised fashion.

Harmonised criminalisation of offences is a continuing phenomenon in international law. Criminalisation of some offences that occur in association with MLR crimes has occurred. This means that some aspects of MLR crimes are already in the process of being universalised. Where harmonisation occurs, the extension of international law enforcement cooperation to facilitate the enforcement of national criminal jurisdiction is a practical exercise in universalised enforcement. However, the aspects of MLR crime that are being harmonised as global crimes are incidental and piecemeal.

CHAPTER 7.

UNILATERAL EXERCISES OF LONG ARM NATIONAL JURISDICTION

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The 1982 United Nations Convention on the Law of the Sea (LOSC) provides flag States with exclusive jurisdiction over vessels entitled to fly their flag on the high seas.¹¹⁹ Flag States are obliged to implement measures to ensure that such vessels comply with agreed international rules and standards in regard to safety, the prevention of marine pollution, social matters, labour conditions, as well as a range of other requirements.¹²⁰ In conjunction with this provision, article 217 requires that flag States enforce compliance “with applicable international rules and standards” irrespective of where a violation occurs.¹²¹ Illegal harvesting of marine living resources is arguably a consequence of the regime of exclusive flag State jurisdiction and “the most significant enforcement gap in the legal regime for the high seas.”¹²²

Although LOSC provides flag States with exclusive jurisdiction over their vessels on the high seas, it does not afford them exclusive jurisdiction over individuals on such vessels. Pursuant to article 117 of LOSC, all States have a duty to take necessary measures to ensure that their nationals conserve the living resources of the high seas.¹²³ The provisions of LOSC Part VII indicate that States are able to regulate the behaviour of their nationals employed upon fishing vessels on the high seas, regardless of the nationality of the vessel.

The International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU), adopted in 2001 by the UN Food and Agricultural Organisation (FAO), also specifically provides that States should adopt measures aimed at preventing their nationals from registering their vessels under a flag that is unwilling or unable to meet its international responsibilities.¹²⁴ States are also

¹¹⁹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397(entered into force 16 November 1994), art 92.

¹²⁰ LOSC, art 94.

¹²¹ LOSC, art 217(1).

¹²² Rosemary Rayfuse, ‘The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction’ (2009) 2 *The University of New South Wales Faculty of Law Research Series* 1, 3.

¹²³ LOSC, art 117. Together with article 116, the Convention utilises the principle of active nationality to vest States with jurisdiction over their nationals engaged in fishing upon the high seas, and imposes a further responsibility upon States to ensure their nationals comply with measures aimed at conserving marine living resources. Although the 1958 High Seas Fishing Convention defined ‘nationals’ to mean vessels, ‘nationals’ is not defined in the 1982 LOSC and subsequent usage indicates that its meaning in the 1982 LOSC is broader and means natural and legal persons as well as vessels.

¹²⁴ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Food and Agriculture Organisation of the United Nations, Rome, 2 March 2001. paragraph 19. Note that only natural and legal persons can register vessels and, so, the meaning of ‘nationals’ is intended to be broader than vessels alone.

urged to adopt sanctions “of sufficient severity” to deter their nationals from engaging in IUU fishing,¹²⁵ thereby encouraging States to impose criminal and civil sanctions aimed at preventing their nationals from engaging in the illegal harvesting of marine living resources.

In the regional context, Article 23(5) of the Convention on the Conservation and Management of High Migratory Fish Stocks in the Western and Central Pacific Ocean provides that:

Each member of the Commission shall, to the greatest extent possible, take measures to ensure that its nationals, and fishing vessels owned or controlled by its nationals fishing in the Convention Area, comply with the provisions of this Convention. To this end, members of the Commission may enter into agreements with States whose flags such vessels are flying to facilitate such enforcement. Each member of the Commission shall, to the greatest extent possible, at the request of any other member, and when provided with the relevant information, investigate any alleged violation by its nationals, or fishing vessels owned or controlled by its nationals, of the provisions of this Convention or any conservation and management measure adopted by the Commission. A report on the progress of the investigation, including details of any action taken or proposed to be taken in relation to the alleged violation, shall be provided to the member making the request and to the Commission as soon as practicable and in any case within two months of such request and a report on the outcome of the investigation shall be provided when the investigation is completed.

Long-arm jurisdiction is the exercise of national laws to affect behaviour within foreign jurisdictions. Legislation is enacted with extraterritorial application but it is enforced within the jurisdiction of the State that enacted it. Long-arm enforcement of MLR conservation and management standards enables a State to take enforcement action against MLR crimes committed in a foreign jurisdiction but as a crime against its own laws within its own jurisdiction.

EXTRATERRITORIAL PRESCRIPTIVE JURISDICTION

Do States have an agreed right recognised under international law to legislate or enforce legislation intended to affect behaviour in another State's jurisdiction? Long-arm legislation would need to be based upon recognised principles of international law.

The principle of territoriality is the primary source of jurisdiction within international criminal law as States are authorised, and even obliged, to criminalise certain conduct committed within their own territory. Despite the principally territorial nature of State jurisdiction, international customary law recognises four additional bases for a State to validly prescribe conduct as criminal.¹²⁶ These are: active nationality, passive personality, the protective principle, and universal jurisdiction. The four extraterritorial principles allow States to criminalise conduct outside of their territory. As explained below, universal jurisdiction is considered an exceptional jurisdictional principle, as it does not require a nexus between the perpetrator, the crime, and the criminalising State.

Territoriality

The principle of territorial jurisdiction, which is the longest and most well established basis of criminal jurisdiction, permits States to prescribe and enforce against crimes committed within their own territory.¹²⁷ Consistent with the principles of sovereignty in a State's own territory and non-intervention by foreign countries, States logically have both prescriptive and enforcement jurisdiction over crimes committed within their own territory. The significance of the principle of territoriality in international law was demonstrated in the judgment of The Permanent Court of International Justice (PCIJ), which held in the *Lotus* case that “in all systems of law the principle of the territorial character of criminal law is fundamental.”¹²⁸

Active Nationality

The principle of active nationality provides States with jurisdiction over certain criminal offences committed by their nationals abroad. Active nationality is a form of extraterritorial jurisdiction that ensures that nationals comply with State law, ‘whether at home or abroad.’¹²⁹ The active nationality principle has long been established as a basis for prescriptive jurisdiction by civil law system countries and, more recently, the active nationality principle has been the basis for common law countries such as Australia to enact laws criminalising sexual offences by their residents against children while overseas.¹³⁰ Further, many treaties, including the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment,¹³¹ the Convention on the

¹²⁵ IPOA-IUU, paragraph 21.

¹²⁶ Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 277.

¹²⁷ The Australian Red Cross has described territoriality as “the strongest basis for the assertion of a states jurisdiction.” Australian Red Cross and Malleons Stephen Jaques, ‘The Principle of Universal Jurisdiction,’ available at www.redcross.org.au/files/2010_The_Principle_of_Universal_Jurisdiction.pdf

¹²⁸ S.S. *Lotus* (France v Turkey), 1927 PCIJ (ser. A) No.10, 50.

¹²⁹ Cassese, above n 6, 280.

¹³⁰ The *Criminal Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) inserted Division 272, entitled ‘Child sex offences outside Australia,’ into the *Criminal Code Act 1995* (Cth). Naomi Svensson, ‘Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Law’ (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 641, 642.

¹³¹ 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, Art 5(1).

Taking of Hostages,¹³² and the Convention on International Protected Persons authorise extraterritorial jurisdiction based on the active nationality principle.¹³³

Passive Personality

The principle of passive personality provides States with jurisdiction over crimes committed abroad that result in harm to their nationals. The rationale behind this principle is to allow States to protect their nationals living abroad.¹³⁴ Although the passive personality principle has been much criticised for its potential to authorise legal interference in the internal affairs of other countries,¹³⁵ it has been recognised in international treaties such as the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons¹³⁶ and the United Nations Convention Against Torture.¹³⁷ The passive personality principle is now seen as “generally acceptable to States,” in certain circumstances.¹³⁸

Protective Principle

The protective principle permits States to exercise jurisdiction over crimes perpetrated abroad that harm their national interests. According to Bantekas, it is “unequivocally accepted” that international law permits States to take measures “in order to safeguard their national security interests.”¹³⁹ A State’s ability to combat international crime by enacting municipal law that prohibits the counterfeiting of its currency abroad is one such example of the utilisation of the protective principle as a basis for jurisdiction.¹⁴⁰ However, it is conceivable for the protective principle to provide the basis of jurisdiction over a number of MLR-related measures.¹⁴¹

Universal Jurisdiction

Universal jurisdiction permits States to assert jurisdiction over crimes irrespective of where they are committed, and without regard to the nationality of the perpetrator or of the victim. It provides States with the jurisdictional basis where the traditional links of territoriality, nationality and personality do not exist. Arguably, there is an indirect relationship with the State’s interests in maintaining the international legal order, however it is this lack of a nexus between the commission of the offence and the State asserting jurisdiction that has led to the principle of universal jurisdiction being described as an “exceptional international jurisdictional doctrine.”¹⁴² The prescriptive exercise of universal jurisdiction is restricted to only a handful of international crimes, comprising grave humanitarian crimes. It is generally accepted that international law authorises States to exercise jurisdiction over piracy, genocide, crimes against humanity and war crimes, with continued debate over the legitimacy of universal jurisdiction over the crimes of torture and terrorism.¹⁴³

EXTENDED CRIMINAL JURISDICTION

Long-arm criminal jurisdiction enacts and enforces criminal laws to prohibit harmful behaviour in foreign jurisdictions. In relation to MLR harms, long-arm laws have been enacted to criminalise illegal harvesting of MLR, possession of illegally harvested MLR and laundering of illegally harvested MLR.

Illegal Fishing in a Foreign Jurisdiction

By 2000, some States had developed national legislation aimed at regulating their national fisherman engaged on foreign-flagged vessels. Several States have criminalised the illegal harvesting of marine resources by their nationals, regardless of where the violation occurs. This ‘long-arm’ criminal enforcement is based upon the recognised principle of active personality and the ability for States to regulate the behaviour of their citizens irrespective of where they are located.

¹³² 1979 Convention on the Taking of Hostages, Art 8(1)(b).

¹³³ 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Art 6(1)(b).

¹³⁴ Cassese, above n 6, 283.

¹³⁵ Ilias Bantekas, *International Criminal Law* (Hart Publishing, 4th ed, 2010) 340.

¹³⁶ 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Art 3(1)(c).

¹³⁷ 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, Art 5(1)(c).

¹³⁸ Kenneth Randall, ‘Universal Jurisdiction Under International Law’ (1988) 66 *Texas Law Review* 785, 788.

¹³⁹ Bantekas, above n 16, 342.

¹⁴⁰ Cassese, above n 6, 277.

¹⁴¹ Amnesty International, ‘Universal Jurisdiction: The Duty of States to Enact and Implement Legislation,’ 10 available at : <http://www.amnesty.org/en/library/info/IO53/003/2001>

¹⁴² Anthony Colangelo, ‘Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law’ (2007) 48 *Harvard International Law Journal* 121, 130.

¹⁴³ Allyson Bennett, ‘That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act’ (2012) 37 *The Yale Journal of International Law* 433, 436.

In 1998, Norway criminalised fishing by its nationals on the high seas who fail to comply with the standards of a regional fisheries management organisation that has competence in the area. The Norwegian law also requires nationals engaged in fishing upon the high seas to obtain authorisation from Norwegian authorities before registering their vessel.¹⁴⁴

Similarly, pursuant to s 113A of the *Fisheries Act 1996* (NZ),¹⁴⁵ New Zealand citizens are prohibited from unlawfully taking fish within a foreign jurisdiction. Contravening the provision constitutes an offence and attracts a fine of up to \$250,000.¹⁴⁶ The legislation provides that:

113 A: All fishing within foreign fishing jurisdiction to be authorised

- (1) No New Zealand national, and no person using a ship that is registered under the Ship Registration Act 1992 or that flies the New Zealand flag, may take or transport fish, aquatic life, or seaweed in the national fisheries jurisdiction of a foreign country unless the fish, aquatic life, or seaweed is taken or transported under, and in accordance with, the laws of that jurisdiction.
- (2) Every person who contravenes subsection (1) commits an offence and is liable to the penalty set¹⁴⁷

New Zealand nationals are also prohibited from taking or transporting fish, aquatic life, or seaweed, upon foreign-flagged vessels on the high seas, unless specifically authorised by a State that is a party to a Fish Stocks agreement.¹⁴⁸

In 2007, the District Court of New Zealand convicted two defendants, a New Zealand national and a permanent resident of New Zealand for fishing illegally in the Australian fishing zone without a permit.¹⁴⁹ The Magistrate relied on various international instruments, including LOSC Article 117, the UN Fish Stocks Agreement and the IPOA-IUU, in coming to his decision.

I turn to that part of s 113A which purports to control the activities of New Zealand nationals. I consider that the provisions of the international instruments to which I have already referred establish that the assertion of such a right of control is consistent with international law as either contained or reflected in such instruments. It is true that s 113A was enacted in 1999, before New Zealand's ratification of the Fish Stocks Agreement and adoption of the International Plan of Action.¹⁵⁰

The Australian *Fisheries Management Act 1991* (Cth) also sets out criminal offences for Australian nationals who illegally harvest fish in foreign jurisdictions. It is an offence for an Australian national to use a foreign boat for fishing in the waters of a foreign country, in contravention of an international fisheries management measure.¹⁵¹ This is a strict liability offence, meaning the only defence available is an honest and reasonable mistake of fact.¹⁵² All provisions of the Act apply to Australian citizens¹⁵³ and apply to any area as if it were in the Australian Fishing Zone.¹⁵⁴ This model of extraterritorial application of national fisheries management legislation to all nationals is also utilised by the South African *Marine Living Resources Act* of 1998.¹⁵⁵

Erceg has argued that, in order for States to combat IUU fishing, measures aimed at controlling nationals should be targeted at individuals engaged as masters upon foreign flagged vessels, as they are limited in number and enforcement will be a 'feasible task'.¹⁵⁶ Spanish legislation specifically targets nationals who act as fishing masters and requires them to notify the Spanish General Secretariat for Maritime Fishing before enlisting to work on foreign-flagged vessels of RFMO non-member States.¹⁵⁷ However Spain has also adopted measures similar to the Norwegian, Australian and New Zealand examples and imposes penalties upon all nationals who break fisheries laws while aboard foreign-flagged ships.¹⁵⁸

Despite not providing specific penalties for nationals contravening foreign fisheries legislation, in certain cases Japanese law requires its nationals to obtain permission from the government before working aboard a foreign-flagged vessel.¹⁵⁹ This is required

¹⁴⁴ Norwegian Regulation of Fisheries in Waters Outside the Fisheries Jurisdiction of Any State (March 1998) pursuant to section 6 of the Act of June 1972 (No. 57) relating to participation in the fisheries and section 4 and 9 of the Act of 3 June 1983 (No. 40) relating to sea-water fisheries; cited in Diane Erceg, 'Deterring IUU Fishing Through State Control Over Nationals' (2006) 30 *Marine Policy* 173, 174.

¹⁴⁵ *Fisheries Act 1996* (NZ) s 113A(1).

¹⁴⁶ *Fisheries Act 1996* (NZ) s 113A(2).

¹⁴⁷ Penalties are set out in *Fisheries Act 1996* (NZ) s 252(3).

¹⁴⁸ *Fisheries Act 1996* (NZ) s 113E. An individual contravening this provision is liable to a fine of up to \$250,000; *Fisheries Act 1996* (NZ) s 252(3).

¹⁴⁹ Ministry of Fisheries v Tukunga, District Court (Wellington), CR-2005-085-6992& 6989, 30 March 2007.

¹⁵⁰ Ministry of Fisheries v Tukunga, para 39.

¹⁵¹ *Fisheries Management Act 1991* (Cth) s 105F.

¹⁵² *Fisheries Management Act 1991* (Cth) s 105F(2). It attracts a fine of 60 penalty units. s 105FA of the Act provides an almost identical offence with a higher penalty of 500 penalty units.

¹⁵³ *Fisheries Management Act 1991* (Cth) s 8.

¹⁵⁴ Diane Erceg, 'Deterring IUU Fishing Through State Control Over Nationals' (2006) 30 *Marine Policy* 173, 174.

¹⁵⁵ Diane Erceg, 'Deterring IUU Fishing Through State Control Over Nationals' (2006) 30 *Marine Policy* 173, 174.

¹⁵⁶ Diane Erceg, 'Deterring IUU Fishing Through State Control Over Nationals' (2006) 30 *Marine Policy* 173, 175.

¹⁵⁷ Spanish Royal Decree 1134/2002 of October 31 on the application of sanction in matters of sea fishing to Spanish nationals enlisted on board vessels flying flags of convenience in

Diane Erceg, 'Deterring IUU Fishing Through State Control Over Nationals' (2006) 30 *Marine Policy* 173, 174.

¹⁵⁸ Elizabeth DeSombre, *Flagging Standards: Globalization and Environmental, Safety, and Labor Regulations at Sea* (MIT Press, 2006) 155.

¹⁵⁹ Elizabeth DeSombre, *Flagging Standards: Globalization and Environmental, Safety, and Labor Regulations at Sea* (MIT Press, 2006) 154.

only where the vessel is fishing for Atlantic and Southern Bluefin Tuna and is designed to prohibit Japanese nationals from circumventing RFMO regulations by re-flagging vessels to States who are unable or unwilling to enforce treaty obligations.

Possession of Products Illegally Obtained in a Foreign Jurisdiction

A national law with extraterritorial operation that might serve as a model for 'long arm' legislation has been pioneered in the United States to criminalise specified acts that are committed as breaches of foreign environmental laws. The Lacey Act was enacted in the United States in 1900 and is the country's oldest national wildlife law, remaining unique in its extended global reach to enforce fish, wildlife, or wild plant law. The Act makes it unlawful to deal in any fish, wildlife or wild plant regulated by State, federal, Native American tribal or foreign laws or regulations, if that specimen was obtained in violation of one of those laws or regulations. Thus, the Act makes a subsequent dealing in the specimen illegal, including importing, exporting, transporting, selling or receiving, even if that subsequent dealing is by a different person or at a different time from the primary violation of foreign laws or regulations on taking, possessing transporting or selling the specimen.¹⁶⁰

The main provision of the Lacey Act that sets out prohibited acts in relation to possessing or handling illegally obtained fish or wildlife is §3372.¹⁶¹

§ 3372. Prohibited acts

Sub sec (a) makes it unlawful for any person—

- (3) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;
- (4) to commit the same when it occurs in interstate or foreign commerce and violates any law or regulation of any State or any foreign law;
- (5) within the special maritime and territorial jurisdiction of the United States ... to possess or commit the same as in (1) in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law...

The Lacey Act also requires an import declaration for plants and plant products, except for plant-based packaging materials used exclusively to import other products. Importers must file a declaration upon importation that contains the scientific name of the plant, the value of the importation, the quantity of the plant, and the name of the country from which the plant was taken. A secondary provision of the Lacey Act prohibits the making or submitting of any false record of any wildlife imported, exported, transported, sold, purchased, or received from any foreign country.¹⁶²

Violations of the Lacey Act provisions against unlawful dealing can be prosecuted as serious offences (felonies) or as non-serious offences (misdemeanours), depending upon the degree of criminal intention. For a felony, the defendant must have knowingly imported or exported fish or wildlife or plants in violation of an underlying law or regulation, or knowingly engaged in the sale or purchase of them with a market value of over USD \$350, while knowing that the fish or wildlife or plants were taken, possessed, transported or sold in violation of an underlying law or regulation. A misdemeanour penalty requires that the defendant failed to exercise "due care" and should have known the specimens were originally illegal.

The Lacey Act's §3373 then provides varying penalties with regard to the requisite knowledge or intent of the individual involved.¹⁶³ Where a person, in the exercise of due care, should have known that the fish or wildlife were taken in an unlawful manner, that person is liable for a civil penalty of up to \$10,000.¹⁶⁴ A person who knowingly imports or exports fish or wildlife in contravention to the Act, is liable for a fine of up to \$20,000 or five years imprisonment, or both.¹⁶⁵ Forfeiture of illegally produced fish or wildlife is permitted under §3374, "notwithstanding any culpability requirements."¹⁶⁶ Pursuant to this section, the vessels, vehicles, aircraft and other equipment used to contravene the Act may also be subject to forfeiture under specific circumstances.¹⁶⁷

The Lacey Act is a tool extensively utilized by USA authorities to prevent and deter the criminal possession and handling of products illegally obtained in foreign jurisdictions. It sanctions individuals and corporations who handle products illegally harvested outside of the boundaries of the USA, regardless of the individual's knowledge.

¹⁶⁰ Prior to its amendment in 2008, the Lacey Act applied to wildlife generally but to wild plants only if they were native to the United States and listed in one of the three appendices to CITES or in a federal or state threatened species law. The Farm Bill 2008 ('Food, Conservation, and Energy Act') extended the coverage of wild plants to include products from plants illegally harvested in the country of origin. This means that dealing in products, such as the importation of wood products from illegally logged trees, even if manufactured outside the foreign country where the illegal logging took place, is prohibited under the Lacey Act.

¹⁶¹ 16 USC § 3372 (1900).

¹⁶² Robert Anderson, 'The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking' (1995) 16 *Public Land Law Review* 27, 53.

¹⁶³ 16 USC § 3373 (1900).

¹⁶⁴ 16 USC § 3373 (1900).

¹⁶⁵ 16 USC § 3373 (1900).

¹⁶⁶ 16 USC § 3374 (1900).

¹⁶⁷ 16 USC § 3374 (1900).

The Lacey Act has gained international attention and other States such as Papua New Guinea, Nauru and the Solomon Islands, have adopted provisions similar to it within their national fisheries legislation.¹⁶⁸ The final report of the High Seas Task Force has also recommended that States implement a “long-arm” approach to enforcement similar to the provisions of the US Lacey Act.¹⁶⁹

Laundering the Proceeds of Foreign Crimes

Marine living resources crimes often relate to further crimes such as money laundering, corruption, document forgery, and fraud.¹⁷⁰ The Financial Action Task Force (FATF) has defined ‘money laundering’ as “the processing of criminal proceeds to disguise their illegal origin.”¹⁷¹ More simply, money laundering involves any activity with the purpose of concealing the illegal origin of criminal proceeds.¹⁷² In the context of the illegal harvesting of marine living resources, money laundering allows criminal organisations to enjoy the profits of their illegal harvest with impunity.

Studies have indicated that marine living resource crimes can be perpetrated by highly organised transnational operations that engage in criminal activity across multiple jurisdictions.¹⁷³ Illegally harvested resources are often added to legal catches and sold into markets through fraud, document forgery or bribery, with the profits then being laundered to conceal their illegal origins. An assessment of financial crime and money laundering in the Solomon Islands found that environmental crime, such as illegal logging and the illegal harvesting of fish and wildlife, was the third highest predicate offence for money laundering in the Pacific.¹⁷⁴

The United Nations Convention against Transnational Organized Crime (CTOC) requires State parties to criminalise the laundering of the proceeds of crime.¹⁷⁵ A report from the CTOC Secretariat stated that it was important for States to adopt a “follow-the-money approach” to transnational environmental crime by using anti-money-laundering measures.¹⁷⁶ INTERPOL has acknowledged the link between fisheries crimes and ‘other forms of serious transnational crime including corruption, money laundering, fraud, human and drugs trafficking’¹⁷⁷ and has recently launched ‘Project Scale’, an initiative aimed at combatting fisheries crime.¹⁷⁸ The current international attention to money laundering of the proceeds of natural resources crimes suggests that the potential of anti-money laundering law enforcement methods to ensure that individual crime bosses and beneficiaries may be brought to justice, has been recognised.

The relationship between the illegal harvesting of MLR and money laundering can be seen in the case of *McNab*,¹⁷⁹ decided in 2003 in the US Circuit Courts of Appeals. Following an investigation by the US National Oceanic and Atmospheric Administration (NOAA), four individuals were charged with illegally harvesting spiny lobster from the Caribbean and smuggling the product into the US.¹⁸⁰ The smugglers were found guilty on 101 counts of smuggling, conspiracy, money laundering and violations of the Lacey Act.¹⁸¹

The interaction between MLR crime and money laundering is also recognised in the recently amended anti-money laundering legislation of the Philippines. The *Republic Act No. 9160* defines ‘money laundering’ as a crime where “the proceeds of unlawful activity...are transacted, thereby making them appear to have originated from legitimate sources.”¹⁸² In 2012, the Act was amended¹⁸³ specifically to include violations of articles 86-106 of the *Fisheries Code*¹⁸⁴ within the definition of ‘unlawful activity’ forming a predicate offence in money laundering. Such violations now include unauthorised fishing,¹⁸⁵ poaching,¹⁸⁶ the use of

¹⁶⁸ Ariella D'Andrea, *The ‘Genuine Link’ Concept in Responsible Fisheries: Legal Aspects and Recent Developments* (November 2006) Food and Agricultural Organization of the United Nations <http://www.fao.org/fileadmin/user_upload/legal/docs/lpo61.pdf>

¹⁶⁹ High Seas Taskforce, *Closing the Net: Stopping Illegal Fishing on the High Seas*, 79 available at http://www.imcsnet.org/imcs/docs/hstf_final_report.pdf

¹⁷⁰ United Nations Office on Drug and Crime, *Transnational Organized Crime In The Fishing Industry*, 97.

¹⁷¹ Financial Action Task Force, *What is Money Laundering*, available at: <http://www.fatf-gafi.org/pages/faq/moneylaundering/>

¹⁷² John Broome, *Anti-Money Laundering: International Practice and Policies* (Sweet and Maxwell, 2005) 2.

¹⁷³ United Nations Office on Drug and Crime, *Transnational Organized Crime In The Fishing Industry*, 127

¹⁷⁴ Solomon Island Financial Intelligence Unit Financial Crime & Money Laundering Risk Assessment(2008) at 5, available at <http://publicintelligence.info/Financial-Crime-and-Money-Laundering-Risk-Assessment.pdf>.

¹⁷⁵ *United Nations Convention Against Transnational Organized Crime*, signed 15 November 2000 (entered into force 29 September 2003), art 6.

¹⁷⁶ Conference of the Parties, *United Nations Convention against Transnational Organized Crime, Activities of the United Nations Office on Drugs and Crime to Address Emerging Forms of Crime: Note by the Secretariat*, UN Doc CTOC/CP/2010/3 (18-22 October) 38.

¹⁷⁷ *Interpol Launches Project Scale to Combat Fisheries* (26 February 2013) INTERPOL <<http://www.interpol.int/News-and-media/News-media-releases/2013/PR024>>

¹⁷⁸ *Interpol Launches Project Scale to Combat Fisheries* (26 February 2013) INTERPOL <<http://www.interpol.int/News-and-media/News-media-releases/2013/PR024>>

¹⁷⁹ *United States v. David Henson McNab*, Robert D. Blandford, Abner Schoenwetter and Diane Hiang. United States Court of Appeals for the Eleventh Circuit, 324 F.3d 1266*, 2003 US App. LEXIS 5561, Decided 21 March 2003.

¹⁸⁰ Diane Erceg, ‘Deterring IUU Fishing Through State Control Over Nationals’ (2006) 30 *Marine Policy* 173, 174.

¹⁸¹ Diane Erceg, ‘Deterring IUU Fishing Through State Control Over Nationals’ (2006) 30 *Marine Policy* 173, 174.

¹⁸² Republic Act No. 9160, the Anti-Money Laundering Act of the Philippines (2001) rule 4.

¹⁸³ Republic Act No. 10365, an Act Further Strengthening the Anti-Money Laundering Law of the Philippines (2012) s 2(21).

¹⁸⁴ Republic Act No. 8550, the Philippine Fisheries Code (1998).

¹⁸⁵ Republic Act No. 8550, the Philippine Fisheries Code (1998) s 86.

¹⁸⁶ Republic Act No. 8550, the Philippine Fisheries Code (1998) s 87.

unlawful fishing techniques such as explosives and electricity,¹⁸⁷ fishing during closed season,¹⁸⁸ the taking of rare, threatened or endangered species,¹⁸⁹ and importing or exporting fish in violation of the *Fisheries Code*.¹⁹⁰ Engaging in such activities now not only constitutes an offence against Philippines fisheries laws but, where the proceeds of such activities are laundered, individuals may face further charges related to money laundering offences.

Canada offers less specific coverage of marine living resource crime as predicate offences for money laundering. The Canadian *Criminal Code* makes it an offence to deal with the proceeds of a “designated offence” committed within Canada, or any other foreign jurisdiction.¹⁹¹ The provision states:

(1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

Individuals who violate provisions of Canada’s *Fisheries Act 1985*¹⁹² commit “designated offences” and as such may also be convicted of money laundering where they had the intent of concealing or converting the proceeds of that offence.

Money laundering under the Australian *Criminal Code* requires that the proceeds of a crime be derived from an ‘indictable offence.’¹⁹³ Within the *Criminal Code*, an indictable offence is an offence punishable by imprisonment for a period exceeding twelve months.¹⁹⁴ Most offences under the *Fisheries Management Act* attract fines rather than imprisonment, thus restricting the ability for such offences to be utilised as predicate offences to money laundering. For example, where an Australian-flagged vessel has engaged in unauthorised fishing on the high seas, the maximum available penalty is a fine.¹⁹⁵ This means that MLR crimes cannot generally be predicate offences under the anti-money laundering legislation.

In contrast, in the Australian state of Victoria, anti-money laundering legislation is quite simple in its construction, stating that any person who knowingly deals with the proceeds of crime, with the intent of concealing its origins, is liable to twenty years imprisonment.¹⁹⁶ Two individuals charged with money laundering offences in relation to illegal catches of more than five tonnes of endangered freshwater fish were convicted of knowingly dealing with the proceeds of crime.¹⁹⁷ They were not charged with crimes relating to the illegal harvesting, but rather were charged in relation to laundering offences and dealing with the profits of their offence.

In New Zealand, the *Crimes Act* makes it illegal to engage in a money laundering transaction in respect of any property that is a proceed of a ‘serious offence.’¹⁹⁸ A serious offence is defined as an offence punishable by imprisonment for a term of five years or more¹⁹⁹ and the illegal harvesting of marine resources on the high seas²⁰⁰ carries a prison sentence of not more than five years.²⁰¹ As such, the laundering of any proceeds from the illegal harvesting of marine resources on the high seas can constitute a separate criminal offence.

The High Seas Fisheries Taskforce identified the significance of money-laundering within IUU fishing, stating that criminal activity focuses on “inserting illegal product into the chain of supply” and involves activities such as “the vertical integration of fishing businesses to facilitate money-laundering, the falsification of documentation and the bribery of officials.”²⁰² The Taskforce further noted that such activities have a negative effect on society and proposed measures aimed at reducing “broader illegal activity such as money laundering” as a means to combat IUU fishing and marine living resource crime.²⁰³

¹⁸⁷ Republic Act No. 8550, the Philippine Fisheries Code (1998) s 88.

¹⁸⁸ Republic Act No. 8550, the Philippine Fisheries Code (1998) s 95.

¹⁸⁹ Republic Act No. 8550, the Philippine Fisheries Code (1998) s 97.

¹⁹⁰ Republic Act No. 8550, the Philippine Fisheries Code (1998) s 100.

¹⁹¹ *Criminal Code*, RSC 1985, cC-46, s 462.31.

¹⁹² *Fisheries Act*, RSC 1985, c F-14, s 78(b).

¹⁹³ *Criminal Code Act 1995* (Cth) s 400.3.

¹⁹⁴ *Crimes Act 1914* (Cth) ss 4G, 23WA(1).

¹⁹⁵ *Australian Fisheries Management Act 1991* (Cth) s 105A.

¹⁹⁶ *Crimes Act 1958* (Vic) s 194(1).

¹⁹⁷ Steve Butcher, *Plunder of Endangered River Fish Exposed* (15 May 2010) The Age <<http://www.theage.com.au/national/plunder-of-endangered-river-fish-exposed-20100514-v4n8.html>>

¹⁹⁸ *Crimes Act 1961* (NZ) s 243.

¹⁹⁹ *Crimes Act 1961* (NZ) s 243.

²⁰⁰ *Fisheries Act 1996* (NZ) s 113J.

²⁰¹ *Fisheries Act 1996* (NZ) s 252.

²⁰² Ministerially-led Task Force on IUU Fishing on the High Seas, *Closing the Net: Stopping Illegal Fishing on the High Seas* (March 2006) 22<http://www.imcsnet.org/imcs/docs/hstf_final_report.pdf>

²⁰³ Ministerially-led Task Force on IUU Fishing on the High Seas, *Closing the Net: Stopping Illegal Fishing on the High Seas* (March 2006) 61<http://www.imcsnet.org/imcs/docs/hstf_final_report.pdf>

Nevertheless, it is clear that many jurisdictions do not adequately criminalise the laundering of the proceeds from illegal harvesting. Despite many States failing to adequately legislate to prevent the laundering of profits gained from marine living resource crime, further developments within this field can be expected.

EXTENDED CIVIL JURISDICTION

In their civil jurisdictions, States have the power to deal in fines and property by imposing non-criminal penalties, confiscating property, enforcing the payment of debts, issuing injunctions and so forth.

Civil Penalties

Civil penalty provisions in most instances require an element of knowledge of the illegal nature of the provenance of the natural resources property on the part of the party against whom an enforcement action is brought. However, legislation can impose penalties on a strict liability basis, without fault and for which no actual intent need be proved. The USA has been the jurisdiction most active to date in asserting its market power to affect behaviour in other jurisdictions by using civil sanctions.

Lacey Act

The Lacey Act civil forfeiture provisions are enforceable on a strict liability basis, authorising the forfeiture of products and thereby removing any ‘innocent third party’ defence.²⁰⁴ Recent litigation under its provisions demonstrated that foreign governments may successfully sue for compensation against individuals or corporations who import stolen MLR into the USA.²⁰⁵ In the case of *U.S. v. Arnold Bengis et al*, the Government of South Africa was awarded over USD \$22 million in restitution for the illegal harvest of South and West Coast rock lobster.²⁰⁶

The District Court found, however, that the trial magistrate erred in evaluating South Africa’s case for restitution,²⁰⁷ as redress for the illegal harvesting of the South Coast lobster was available only for the portion imported into the USA.²⁰⁸ The Court held that “our restitution statute does not permit, let alone require, restitution for conduct that does not offend our laws”²⁰⁹ and that restitution could not be awarded for illegal harvesting per se:

[T]his Court sees no legal basis for awarding restitution to South Africa for lobster taken in violation of South African law that neither was shipped to the United States nor taken for the purpose of its shipment to this country.²¹⁰

Yet the Court found that “there is no serious dispute that South Africa is entitled to restitution of the value of the West Coast lobster that was shipped to the United States.”²¹¹ Despite the fact that the illegal harvest of South Coast lobster caused harm to South Africa, to be successful in obtaining restitution under the Lacey Act, the illegally harvested MLR product must be illegally imported, transported, sold, received, handled or possessed in the USA.

Pirate Fishing Bill

The recently proposed Pirate Fishing Elimination legislation²¹² in the United States will allow a civil penalty, in the form of a maritime lien, to be imposed upon a vessel where it has been involved in the commission of any of a range of prohibited acts, including illegal fishing and document fraud.²¹³ Pursuant to section 9(9) of the proposed legislation, it will be unlawful for any person to:

import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or fish product taken, possessed, transported, or sold in violation of any foreign law or treaty addressing the conservation or management of living marine resources, or any conservation and management measures.²¹⁴

The Pirate Fishing Elimination Bill outlines a range of additional prohibited actions, including: refusing the boarding or inspecting of a vessel by an authorised officer,²¹⁵ committing certain acts against an authorised officer,²¹⁶ resisting arrest,²¹⁷ providing false

²⁰⁴ Duncan Brack, ‘Controlling Illegal Logging: Lessons From the US Lacey Act’ (2007) *Chatham House* 1, 2.

²⁰⁵ 16 USC § 3372 (1900).

²⁰⁶ *United States v. Bengis*, 03 Cr. 0308 (LAK), 2007 WL 241370.

²⁰⁷ *United States v. Bengis*, 631 F.3d 33, 35-37 (2d Cir. 2011).

²⁰⁸ *United States v. Bengis*, 03 Cr. 0308 (LAK), 2007 WL 241370.

²⁰⁹ *United States v. Bengis*, 03 Cr. 0308 (LAK), 2007 WL 241370.

²¹⁰ *United States v. Bengis*, 03 Cr. 0308 (LAK), 2007 WL 241370.

²¹¹ *United States v. Bengis*, 03 Cr. 0308 (LAK), 2007 WL 241370.

²¹² A Bill to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing Through Port State Measures, S 1980, 112th Congress (2011) (‘Pirate Fishing Elimination Act’).

²¹³ Pirate Fishing Elimination Act, § 10(3).

²¹⁴ Pirate Fishing Elimination Act, § 9(9).

²¹⁵ Pirate Fishing Elimination Act, § 9(2).

²¹⁶ Pirate Fishing Elimination Act, § 9(3).

information,²¹⁸ and committing document fraud in relation to any fish or fish product.²¹⁹ The enforcement provisions provide that, where a vessel is used in the commission of a prohibited act under section 9, a maritime lien will be imposed as a civil penalty.²²⁰ The maritime lien may then “be recovered in an action in rem in the district court of the United States having jurisdiction over the vessel.”²²¹ In addition to imposing a lien, the vessel may then also be subject to either criminal²²² or civil forfeiture²²³ for breaches of the legislation.

The Pirate Fishing Elimination Bill has been described as an attempt by the US to fulfill its obligations under the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing²²⁴ and was cited approvingly by the USA Senate Committee on Commerce, Science, and Transportation.²²⁵

Liens on Foreign Assets

Maritime liens are a right over the property of a ship owner, traditionally claimed in respect to services rendered to a vessel, or injury caused from its operation. They have been defined as:

a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another – a *jus in re aliena*.²²⁶

While more traditional maritime claims related to wages, the carriage of goods, and other costs associated with the operation of vessels, legislative provisions have created specific categories of statutory claims often related to pollution, IUU fishing and other maritime crimes. Maritime liens continue to be useful as civil penalties to promote redress for injury caused by a vessel or its violation of maritime law. Governments have used liens to promote compliance and to support the enforcement of laws regulating conduct upon the seas²²⁷ and as a remedy to support enforcement for decades. For example, the Japanese Act on Liability for Oil Pollution Damage provides that where a claimant has a limited claim pertaining to oil pollution, a maritime lien may be imposed upon the vessel involved in the accident.²²⁸

As Tetley has outlined “[t]hese statutes confer upon governments or their agencies special rights such as detention and sale of the ship, often coupled with a right of priority on the sale proceeds.”²²⁹ Maritime liens therefore provide a right of priority to a claimant seeking compensation from the owner of a vessel.²³⁰

Many States have also enacted legislation that permits their maritime claims a priority that outranks other existing liens. These laws typically allow authorities to arrest and sell a vessel used in the commission of criminal offence.²³¹ All vessel arrests however, must comply with the provisions of LOSC art 73, which provides a Coastal State with the authority to arrest vessels within the exclusive economic zone to ensure compliance with its laws, particularly in relation to the conservation and management of marine living resources.²³² Arrests under LOSC are also subject to the condition that a vessel and crew will be “promptly released upon the posting of reasonable bond or other security,”²³³ and that the punishment for breaking the law will not include imprisonment,²³⁴ and that the coastal State will promptly notify the flag state upon the arrest of a vessel.²³⁵

²¹⁷ Pirate Fishing Elimination Act, § 9(4).

²¹⁸ Pirate Fishing Elimination Act, § 9(6).

²¹⁹ Pirate Fishing Elimination Act, § 9(9).

²²⁰ Pirate Fishing Elimination Act, § 10(f)(3).

²²¹ A Bill to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing Through Port State Measures, S 1980, 112th Congress (2011), § 10(f)(3).

²²² A Bill to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing Through Port State Measures, S 1980, 112th Congress (2011), § 10(g)(1).

²²³ A Bill to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing Through Port State Measures, S 1980, 112th Congress (2011), § 10(g)(2).

²²⁴ *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, opened for signature 22 November 2009, not yet in force.

²²⁵ S.267 – *Pirate Fishing Elimination Act*, Congress.Gov <<http://beta.congress.gov/bill/113th/senate-bill/267>>

²²⁶ *The Ripon City* [1897] P. 226 at p. 242.

²²⁷ William Tetley, ‘Maritime Liens in the Conflict of Laws’ in J Nafziger and Symeon Symeonides (eds), *Law and Justice in a Multistate World* (Transnational Publishers 2002) 439, 449.

²²⁸ Act on Liability for Oil Pollution Damage Act No. 95 of 1975, (December 27, 1975), s 40. See also the 1969 case of *State of Cal. by and through Dept. of Fish and Game v. S.S. Bournemouth*, 307 F. Supp. 922 (D.C.Cal. 1969), where the California Department of Fish and Game was successful in asserting a maritime lien against a foreign-flagged vessel for damage caused by the discharging of oil off the coast of California.

²²⁹ William Tetley, ‘Maritime Liens in the Conflict of Laws’ in J Nafziger and Symeon Symeonides (eds), *Law and Justice in a Multistate World* (Transnational Publishers 2002) 439, 448.

²³⁰ E.g. Act on Liability for Oil Pollution Damage Act No. 95 of 1975, (December 27, 1975).

²³¹ William Tetley, ‘Maritime Liens in the Conflict of Laws’ in J Nafziger and Symeon Symeonides (eds), *Law and Justice in a Multistate World* (Transnational Publishers 2002) 439, 448.

²³² LOSC art 73(1).

²³³ LOSC art 73(2).

²³⁴ LOSC art 73(3).

²³⁵ LOSC art 73(4).

Australia has taken a novel approach to the arrest of vessels to circumvent these restrictions and overcome competing proprietary claims. The introduction of s 106A into the *Fisheries Management Act 1991* (Cth)²³⁶ came after an unfavourable decision by the Federal Court of Australia, which permitted a Norwegian mortgagee to recover a vessel (the *Aliza Glacial*) arrested by Australian authorities for fisheries offences, despite a forfeiture provision within the *Fisheries Management Act* at the time. The Federal Court of Australia held that the mortgagee's rights prevailed over the Australian Government's proprietary interest.²³⁷ The *Fisheries Management Act* now provides that a foreign boat, its equipment, and any fish on board the vessel immediately 'are forfeited' upon the commission of specified fisheries offence.²³⁸ Thus, it provides for the automatic forfeiture of a vessel at the time in which the vessel committed the unlawful act. As Gullett and Schofield have outlined, "if Australia apprehends a foreign-flagged vessel on the high seas upon suspicion of her committing a relevant fisheries offence in Australian waters...by operation of Australian law, such a vessel would have become an Australian vessel and thus Australia would simply have seized its own vessel."²³⁹

Arrest of Ships

The 1999 *International Convention on Arrest of Ships* is an international regime aimed at regulating the circumstances under which ships may be arrested and subsequently released.²⁴⁰ The 1999 Arrest Convention is the outcome of an international effort to strike a balance between the interests of maritime claimants and the owners of ships and cargo,²⁴¹ is the successor to the 1952 *Brussels Convention on the Arrest of Sea-Going Ships*,²⁴² and was designed to be consistent with the principles of the 1952 Convention and with the 1993 *International Convention on Maritime Liens and Mortgages*.²⁴³ The 1999 Convention took over a decade to reach the ten signatures required to enter into force, and at the time of writing, has 10 ratifications and 15 signatures.²⁴⁴

The 1999 Convention requires a particular link to exist between the ship facing arrest and the individual a maritime claim is made against;²⁴⁵ i.e. the exercise of a right of arrest is legitimate only where the owner²⁴⁶ or demise charterer²⁴⁷ is liable for the claim. The 1999 Convention also maintains the possibility of arresting other ships that are owned by the same person or company against whom a maritime claim is brought.²⁴⁸ The so-called 'sister-ship arrest' provision allows the arrest of any other ship owned by the person who is liable for the maritime claim, where that person was either the owner or demise charterer of the ship when the claim arose.²⁴⁹

The 1999 Arrest Convention contains an exhaustive list of 22 claims that allow a plaintiff to arrest a vessel in particular circumstances, including where they have suffered a loss,²⁵⁰ personal injury,²⁵¹ damage to the environment,²⁵² or unpaid wages.²⁵³ This list was expanded from the 17 enumerated claims within the 1952 Convention,²⁵⁴ and it now includes also claims based on "damage or threat of damage caused by the ship to the environment, coastline, or related interests."²⁵⁵ Conceivably, MLR crimes could give rise to loss and damage that affects coastal economy and amenity that, if made subject to claims in court, could enable the arrest of ships owned by the defendant owner of charterer of the vessel accused of crimes.

²³⁶ *Fisheries Management Act 1991* (Cth) s 106A.

²³⁷ *Bergensbanken ASA v Ship Aliza Glacial* [1998] 1642 FCA 4.

²³⁸ *Fisheries Management Act 1991* (Cth) s 106A.

²³⁹ Warwick Gullett and Clive Schofield, 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean' (2007) 22 *The International Journal of Marine and Coastal Law* 545, 553.

²⁴⁰ Robert Lynn, 'A Comment on the New International Convention on the Arrest of Ships, 1999' (2001) 55 *University of Miami Law Review* 453, 462.

²⁴¹ *International Convention on Arrest of Ships*, opened for signature 12 March 1999 (not yet in force), ('Arrest of Ships Convention').

²⁴² *International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships*, opened for signature 10 May 1952, 439 UNTS 193 (entered into force 24 February 1956).

²⁴³ *International Convention on Maritime Liens and Mortgages*, opened for signature 6 May 1993, 33 I.L.M. 353 (entered into force 5 September 2004).

²⁴⁴ It was adopted by 68 states at the 1999 Diplomatic Conference on Arrest of Ships. *United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships A/CONF. 188/6* (19 March 1999). The 1952 Convention has 71 state parties.

²⁴⁵ Arrest of Ships Convention, art 3.

²⁴⁶ Arrest of Ships Convention, art 3(1)(a).

²⁴⁷ Arrest of Ships Convention, art 3(1)(b).

²⁴⁸ Arrest of Ships Convention, art 3(2).

²⁴⁹ Arrest of Ships Convention, art 3(2). However, the Convention fails to define "owner" or the circumstances which constitute "ownership." The Convention's use of 'ownership' could refer only to legal ownership of a vessel. This would ultimately disregard the reality that many corporations hold 'beneficial ownership' over a large fleet of ships, and thus it "fails to take account of the reality of ship owning in today's maritime commerce and is a substantial impediment to the full realization of the claimants' claim", (see: UNCTAD, *Review of Maritime Transport*, 122, ; Mohammad Islam, 'The Arrest of Ship Conventions 1952 and 1999: Disappointment for Maritime Claimant' (2007) *Journal of Maritime Law and Commerce* 38(1) 65, 79).

²⁵⁰ Arrest of Ships Convention, art 1(1)(a).

²⁵¹ Arrest of Ships Convention, art 1(1)(b).

²⁵² Arrest of Ships Convention, art 1(1)(d).

²⁵³ Arrest of Ships Convention, art 1(1)(o).

²⁵⁴ *International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships*, opened for signature 10 May 1952, 439 UNTS 193 (entered into force 24 February 1956) article 1(1).

²⁵⁵ Arrest of Ships Convention, art 1(1)(d).

Alien Torts - US Statute

The Alien Tort Statute,²⁵⁶ originally enacted in 1789, is a United States law that provides federal courts with jurisdiction to hear cases filed by non-U.S. citizens for torts committed outside of United States territory in particular circumstances. Under the statute, U.S. federal courts are vested with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁵⁷ Perhaps due to the ambiguous wording of the statute or confusion surrounding its intended use, the provision was rarely used for almost two centuries until the District Court decision in *Filártiga v Peña-Irala*²⁵⁸ sparked a relative flood of litigation.²⁵⁹ Since *Filártiga*, non-U.S. citizens have sought to rely on the law to provide redress for human rights abuses by government authorities,²⁶⁰ paramilitary groups,²⁶¹ and various corporations.²⁶²

The wording of the Alien Tort Statute is broad in scope but the courts have restricted its application since the *Filártiga* decision.²⁶³ Plaintiffs face difficulty in demonstrating that a duty has been imposed on a defendant either by the ‘law of nations’ or ‘a treaty of the United States.’²⁶⁴ U.S. Courts have traditionally defined the ‘law of nations’ as establishing ‘substantive principles for determining whether one country has wronged another.’²⁶⁵ The court has previously acknowledged that the law of nations may not always “confine its reach to state action,”²⁶⁶ as individuals can be held liable for genocide, piracy, slavery or war crimes. The issue is further compounded by the recent decision of the Second Circuit Court that the “law of nations” does not apply to corporations.²⁶⁷ No litigation aimed at holding multinational corporations liable for environmental harm has ever been successful under the Alien Tort Statute.²⁶⁸ Yet it is generally perceived that violations of the law of nations for the purposes of the Alien Tort Statute will require state action.²⁶⁹

It must also be noted that U.S. courts have consistently upheld the validity of maritime claims under the Alien Tort Statute. In 1900, the Supreme Court held in *The Paquete Habana* that the capture of fishing vessels as prizes of war was rejected by the ‘law of nations.’²⁷⁰ Furthermore, piracy has consistently been held as part of the law of nations, while in *Sarei v Rio Tinto PLC*, the court held that provisions of the *United Nations Convention on the Law of the Sea* formed part of customary international law and therefore represented the law of nations.²⁷¹

In the special context of US domestic law, it is quite possible that MLR crimes could give rise to claims by foreign nationals against foreign vessel owners or charterers for loss and damage that causes them damage.

²⁵⁶ *The Alien Torts Claims Act*, 28 USC § 1350.

²⁵⁷ *The Alien Torts Claims Act*, 28 USC § 1350.

²⁵⁸ *Filártiga v Peña-Irala*, 620 F.2d 876 (2nd Cir, 1980). The *Filártiga* case saw two Paraguay nationals successfully sue a Paraguayan military officer for the torture and death of their relative, Joelito Filártiga. The Second Circuit court held that as torture violated the “universally accepted norms of the international law of human rights,” it had reached the status of international customary law. The operation of the Alien Tort Statute subsequently provided federal jurisdiction of U.S. Courts to be exercised over the Filártigas’ claim, despite the fact that the acts were committed outside of the territory of the U.S.A. (p 878-890).

²⁵⁹ Odette Murrar, David Kinley and Chip Pitts, ‘Exaggerated Rumours of the Death of An Alien Tort? Corporations, Human Rights and the Remarkable Case of *Kiobel*’ (2011) 12 *Melbourne Journal of International Law* 1, 2.

²⁶⁰ For example in *Re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir, 1994), where the former President of the Philippines was sued for executions and disappearances that occurred during his time in power.

²⁶¹ For example in *Re XE Services Alien Tort Litigation*, 665 F.Supp.2d 569 (ED Va, 2009) where a number of Iraqi citizens sued 11 corporations for employing contract paramilitary services whose practices resulted in numerous deaths.

²⁶² For example, *Presbyterian Church of Sudan v Talisman Energy, Inc.*, 582 F.3d 244 (2nd Cir, 2009).

²⁶³ Ajmel Quereshi, ‘The Search for an Environmental Filártiga: Trans-Boundary Harm and the Future of International Environmental Litigation’ (2012) 56 *Howard Law Journal* 131, 138.

²⁶⁴ *The Alien Torts Claims Act*, 28 USC § 1350. In addition to these limitations, environmental litigation under the Alien Tort Statute has faced a number of procedural hurdles. The first is the test created by the Supreme Court to determine whether an international norm is actionable under the statute. An actionable norm under the “law of nations” must be “specific, universal and obligatory” (*Sosa v Alvarez Machain*, 542 US 692, 732 (2004)). This test has been used by U.S. Courts to subsequently hold that international norms such as the polluter pays principle or the precautionary principle, are not part of the “law of nations” but “merely refer to a general sense of environmental responsibility and state abstract rights and liberties” (*Beanal v. Freeport-McMoran, Inc. (Beanal 1)*, 969 F. Supp. 362 (E.D. La. 1997))

²⁶⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964).

²⁶⁶ The polluter pays principle, the precautionary principle and the proximity principle have been held to “apply to members of the international community rather than non-state corporations,” further “a non-state corporation could be bound by such principle by treaty, but not as a matter of international customary law” (*Beanal v. Freeport-McMoran, Inc. (Beanal 1)*, 969 F. Supp. 362 (E.D. La. 1997)).

²⁶⁷ *Kiobel v Royal Dutch Petroleum*, 621 F.3d 111 (2nd Cir, 2010), where the Second Circuit Court held by a 2-1 majority that corporations were not liable under the *Alien Tort Statute* as “corporate liability is not a norm of customary international law.”

²⁶⁸ Kathleen Jaeger, ‘Environmental Claims Under the Alien Tort Statute’ (2010) 28(2) *Berkeley Journal of International Law* 519, 520.

²⁶⁹ Curtis Bradley, ‘State Action and Corporate Human Rights Liability’ (2010) 85(5) *Notre Dame Law Review*, 1823, 1824.

²⁷⁰ *The Paquete Habana*, 175 US 677, 175 (1900).

²⁷¹ *Sarei v. Rio Tinto PLC and Rio Tinto Ltd (Sarei1)*, 221 F.Supp. 2d 1116 (C.D. Cal. 2002).

CONCLUSION

Long-arm exercises of national jurisdiction are well established in international law and practice. Enactment of extraterritorial laws is permitted if based on upon applicable principles of jurisdiction established in customary international law. Enforcement of those enactments is practised using diverse means criminal law enforcement and civil law strategies. The former includes the imposition of criminal penalties upon nationals entering the jurisdiction who have committed crimes outside under foreign MLR conservation management laws and residents, as well as persons within the jurisdiction who deal in or disguise the origins of MLR products illegally gathered outside the jurisdiction. The latter, civil penalties, tend to be used particularly in the United States and are enforced by means of confiscations and forfeitures of vessels, equipment and catch by governments. Civil enforcement actions against MLR crimes based upon debts generated by vessels associated with the crimes give rise to liens on vessels and arrests of ships but they are more restricted in their application by international and national laws. The increased use of long-arm jurisdiction by many States will present an opportunity for achieving a universalized MLR crime,

CHAPTER 8.

PORT STATE ENFORCEMENT MEASURES

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SOURCE OF PORT STATE JURISDICTION

The sovereignty of a Coastal State extends beyond its land territory to include its ports and internal waters (as well as archipelagic waters and territorial seas).²⁷² As an area of full sovereign jurisdiction, a port entails both the prescriptive and enforcement aspects of sovereign power. The primary significance of Port State jurisdiction for marine living resources (MLR) conservation, however, is its enforcement aspect. That is to say, port waters are not usually abundant in MLR for which conservation laws need to be prescribed. Yet, most seagoing vessels need to enter port during their voyages and Port State power to set conditions of entry for vessels hold enormous potential for the exercise of enforcement jurisdiction. Port State jurisdiction is a firm basis upon which to build universalised jurisdiction to enforce laws against marine living resources crimes.

The decision in the *Attorney General v Bates*²⁷³ in the English Court of Exchequer in 1610 demonstrated that States have had recognised powers to nominate and to determine the conditions for which of their ports are open or closed for international trade for the last half millennium.²⁷⁴ The International Court of Justice in its 1982 judgement on the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua versus United States of America)*²⁷⁵ noted that the right of a State to prescribe conditions for access to its ports derives from the port's legal status as internal waters, which are subject to the State's sovereignty.

The Law of the Sea Convention (LOSC) does not directly address Port State jurisdiction but is consistent with the customary positioning, basing several provisions on the notion of Port State jurisdiction. Principal among these is that 'In the case of ships proceeding to internal waters or a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.'²⁷⁶ In relation to conditions concerning the enforcement of laws for the conservation of MLR specifically, the FAO has defined port State measures (PSMs) as 'requirements established or interventions undertaken by Port States which a foreign vessel must comply with or is subject to as a condition for use of ports within the Port State.'²⁷⁷

²⁷² *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 2(1).

²⁷³ (1610) 2 *State Trials* 371 ('*Bates case*').

²⁷⁴ A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14(3) *San Diego Law Review* 597, 606.

²⁷⁵ [1986] ICJ reports 14, 111.

²⁷⁶ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 25(2)

²⁷⁷ FAO, *Port State Measures* (7 July 2012) FAO Fisheries and Aquaculture Department <<http://www.fao.org/fishery/psm/en>>.

SCOPE OF PORT STATE AUTHORITY

The conditioning of the privilege of port entry by a foreign vessel on the basis of its prior good conduct beyond the coastal jurisdiction of the Port State has its critics who argue that it is an illegitimate extraterritorial projection of State power.²⁷⁸ Although prohibition of entry to a sub-standard vessel that poses a pollution or safety threat is clearly within Port State jurisdiction because the Port State is directly exposed to immediate risk if the vessel enters port, it can be distinguished from breaches of international or foreign Coastal State MLR conservation laws because the breach does not necessarily pose a risk to Port State's own coastal MLR management regime. In response, it is argued that the threat to the Port State is less direct but real as its vessels, nationals or companies may fish, trade or consume MLR resources sourced from those waters beyond its own, particularly in relation to straddling fish stocks and highly migratory species. Therefore, it has a legal interest in prescribing laws supporting lawful conservation and management beyond its on waters.

Such exercises of prescriptive jurisdiction to protect interests extraterritorially are not uncommon in international law and are categorised as exercises of the 'protective principle'.²⁷⁹ Alternatively, the exercise of Port State jurisdiction can be said not to prescribe extraterritorial conduct at all because it is the good character of vessels entering into the Port State's internal waters that is being regulated, not the defiance of international or foreign MLR laws in distant waters. We do not purport to resolve this controversy but note that both the protective principle and the good character entry requirements arguments form sufficient basis to support the Port State conditions.

Consequent upon the prescription of conditions of entry, the Port State can exercise its law enforcement powers by investigating whether foreign vessels that have entered port are in compliance with the conditions of entry. Non-compliance may result in the Port State taking action under its administrative and criminal procedure, such as denial of entry, the imposition of fines, confiscations or prosecutions, or actions under its civil procedures, such as civil penalties and asset seizures.

The conditions a Port State can set for entry into its designated ports may be voluntarily limited by it under treaty, such as by maritime trade or commercial agreements that the Port State has agreed to, but are otherwise set at its discretion. Examples of such agreements include the 1923 *Geneva Convention and Statute on the International Regime of Maritime Ports* and relevant provisions of constitutive agreements for the European Economic Community and the World Trade Organisation. Article 2 of the *Geneva Convention and Statute on the International Regime of Maritime Ports*, for example, provides that its parties will 'grant the vessels of every other contracting state equality of treatment with its own vessels, or those of any other state whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.'

Prior notice should be given to foreign vessels intending to visit port of the Port State's conditions of entry.²⁸⁰ Although not specifically addressed in the LOSC, this general requirement is a matter of logic and is evident in many LOSC provisions. In relation to pollution control, LOSC provides that 'States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels in to their ports ... shall give due publicity to such requirements and shall communicate them to the competent international organisation.'²⁸¹ In the case of vessels entering port to undertake marine scientific research, LOSC provides that 'States shall endeavour ... to facilitate, subject to the provisions of the laws and regulations, access to their harbours and promote assistance for marine scientific research vessels'²⁸²

As the Port State can set these conditions as a manifestation of its sovereignty, there is no requirement that the conditions themselves be limited to reflect a specific international legal norm already set in place by international agreement. The mere fact of entering port in breach of the condition set by the Port State unilaterally triggers its enforcement powers,²⁸³ nor does any offence under international law itself need to have been committed prior to the vessel entering port in order for the Port State to exercise its national enforcement powers.

Moreover, the Coastal State can enforce its criminal jurisdiction on board a foreign vessel even in the territorial sea, if the vessel was previously in port and is passing through the territorial sea after leaving port.²⁸⁴ Similarly, the Coastal State can enforce its civil

²⁷⁸ Jens Thielen (2013) 'What's in a Name? The Illegality of Illegal Unreported and Unregulated Fishing' *The International Journal of Marine and Coastal Law* 28, 1-18.

²⁷⁹ The 'protective principle', like much in international law, is not uncontroversial. See: Ian Brownlie (2008) *Principles of International Law* (7th edn) ch 15.

²⁸⁰ *Geneva Convention and Statute on the International Regime of Maritime Ports*, opened for signature 9 December 1923, 58 LNTS 287 (entered into force 26 July 1926) art 4.

²⁸¹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 211(3).

²⁸² *Ibid* art 255.

²⁸³ Jens Thielen (2013) 'What's in a Name? The Illegality of Illegal Unreported and Unregulated Fishing' *The International Journal of Marine and Coastal Law* 28, 1-18.

²⁸⁴ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 27(2).

jurisdiction against a foreign vessel passing through its territorial waters if the vessel was previously in the Coastal State's internal waters or in respect of liabilities incurred by the ship itself in the course of its voyage through those waters (e.g. for ship services).²⁸⁵ Accordingly, a ship's presence in port gives the Port State the right to enforce its criminal and civil jurisdiction on board that vessel immediately after leaves port while it is still in territorial waters.

Port conditions of entry can be set to limit legal access for vessels that have breached MLR conservation standards. The exercise of port State powers to limit access to vessels that have breached marine pollution control standards is already well established practice.

Pollution on the High Seas Enforced in Port

It is well established in treaty law that, while a foreign vessel is voluntarily in port, the Port State can enforce its marine pollution laws implementing international standards in relation to the activities of the vessel and that occurred prior to the vessel's entry into port, if the activities occurred in the Port State's waters (whether its territorial or exclusive economic zone).²⁸⁶ Article 218 of the LOSC extends Port State enforcement jurisdiction in marine pollution by providing Port States with powers to enforce against breaches of international marine pollution control standards by a foreign vessel, even if the offending act occurred on the high seas.²⁸⁷ The Port State can also enforce marine pollution laws breached in the waters of another Coastal State, at the request of that State or another State affected by the vessel activities.²⁸⁸

These Port State controls on marine pollution were agreed during the 1970s and, looked back upon 40 years later, comprise a cautiously circumscribed exercise of international law. To apply Article 218 on enforcement jurisdiction in marine pollution matters beyond the waters of the Port State, the laws to be enforced by the Port State are limited to those enacted in accordance with the LOSC or applicable international rules and standards for vessel-sourced pollution prevention;²⁸⁹ i.e. international pollution prevention standards to be enforced by a Port State authority on foreign vessels are provided for in international treaties.²⁹⁰ This means that when an activity of a foreign vessel damaging to the marine environment takes place on the high seas or in the waters of another State, but is not in breach of international standards, the Port State is not expressly permitted to take enforcement action.²⁹¹

Other limitations on Port State authority to combat high seas marine pollution are also set in place under the LOSC. A Port State authority may only take administrative measures, such as detaining a ship until corrective measures have been taken or it ordering a ship to proceed to the nearest shipyard for repairs.²⁹² The Port State can impose only monetary penalties for the breach marine pollution control standards in its own waters. For breaches within the territorial sea itself, however, monetary penalties apply, except in cases of 'a wilful and serious act of pollution in the territorial sea.'²⁹³

Finally, under the Port State marine pollution control regime set out in the LOSC, Flag State authority can trump Port State authority. Article 228 provides that if the Flag State itself takes proceedings to impose penalties against a vessel flying its flag for marine pollution activities beyond the territorial seas of the Port State, then the Port State must suspend its proceedings.²⁹⁴ Although there are preconditions for a Flag State to meet in order to displace a Port State's authority to enforce marine pollution breaches beyond its territorial seas, the preconditions can be met by a responsible Flag State in good standing. Therefore, although the LOSC marine pollution control provisions make inroads on exclusive Flag State enforcement jurisdiction, Flag States retains ultimate authority over vessels flying their flags.

²⁸⁵ Ibid art 28.

²⁸⁶ Ibid art 220(1).

²⁸⁷ Ibid art 218.

²⁸⁸ Ibid art 219.

²⁸⁹ Ted L. McDorman, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention' (1997) 28(2) *Journal of Maritime Law and Commerce* 305, 310.

²⁹⁰ SOLAS 74 ch I reg 19, ch IX reg 4 and ch XI reg 4, as amended by SOLAS Protocol 88; Load Lines 66 art 21, as amended by Load Lane Protocol 88; MARPOL 73/78 annex I reg 8A arts 5 - 6, annex II reg 15, annex III reg 8, annex V reg 8; STCW 78 art X; Tonnage Measurement 69 art 12.

²⁹¹ Ted L. McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 *Ocean and Coastal Law Journal* 207, 216.

²⁹² *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) arts 220(7)-226(1)(c). The vessel must be promptly released after inspection and an administrative determination, subject to reasonable procedures such as a financial security or bond. If detention procedures have been established, such as through the IMO or a regional arrangement, whereby a bond can be provided, then the Port State is bound to allow the vessel to proceed subject to the established procedure, art 220(8).

²⁹³ Ibid art 230.

²⁹⁴ Ibid art 228(1) Nevertheless, there are several preconditions that must be met before the Flag State can assert its supervening authority. The proceedings brought by the Flag State must correspond to those brought by the Port State, they must be instituted within six months of the date on which the proceedings were first instituted by the Port State, the coastal injury to the Port State should not be major pollution damage, and the Flag State must not have 'repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels'.

The regime for Port State jurisdiction maintained under the LOSC meshes with the global standards for port state controls to prevent marine pollution from ships specified under the auspices of the International Maritime Organisation.²⁹⁵ In addition, regional standards have been adopted by groups of Port State Authorities under regional memoranda of understanding.²⁹⁶ It should be noted that none of the regional maritime pollution control regimes have expressly obligated the fulfilment of powers to extend enforcement over high seas pollution incidents under LOSC Article 218, although an IMO resolution outlines the type of evidence a Port Authority should look for to determine if there has been a high seas violation.²⁹⁷ Numerous studies have sought to statistically determine how effective Port State control measures have been in combating the marine pollution risk posed by substandard ships.²⁹⁸ The lack of data available for analysis, particularly from regions with limited economic resources, obscures a clear conclusion from being made. For example, some regions do not publish regular annual reports. Nevertheless, a 2008 report recognised trends in the data available for each region indicating that the number of deficiencies and detentions in the North-east Atlantic and Asia-Pacific regions have been decreasing since 2001 and 2003, respectively.²⁹⁹

The regime that enables Port State authorities to take action against vessels engaged in pollution on their coastal waters provides a template for action by Port States against vessels engaged in MLR crime beyond their coastal waters. A comparison of the Port State-based regimes to suppress pollution with those for IUU fishing provides ideas to enable better efforts to use Port State authority to combat MLR crime. The outcomes of the comparison will be discussed below, following examination of PSMs to prevent MLR crime.

MARINE LIVING RESOURCES CONSERVATION ENFORCED IN PORT

There is no explicit provision in LOSC for Port State powers to enforce international standards in relation to MLR crime or IUU fishing. Port States have not been required to play a very active role but merely required to coordinate and cooperate with Flag States.³⁰⁰ Yet, they provide a firm platform for the universalisation of law enforcement jurisdiction to combat MLR crime.

As the LOSC maintains the well-established Port States rights under customary international law to set conditions for entry into port, a Port State can impose conditions on foreign fishing vessels at the sovereign discretion of the Port State. There is no limitation on its discretion to confine those conditions to the standards set for fishing or protection of MLR by global or regional MLR and fisheries management agreements.

Article 23 of the UN Fish Stocks Agreement (FSA) explicitly provides that PSMs can be taken as a matter of right and of duty but also specifies the qualification that the PSMs must be in accordance with international law and promote international fisheries management standards.³⁰¹ However, PSMs are not confined to instances of illegality under international legal standards, as discussed above. Although the Port State might choose to apply PSMs to promote the effectiveness of international standards to combat MLR crime or IUU fishing, it is exercising its sovereign authority over conditions of entry into its internal waters.³⁰² The PSM-IUU Agreement itself provides that it does not affect the powers of the Port States to exercise sovereignty over their ports, including the right to adopt more stringent Port State measures than those provided for in it.³⁰³

The FAO database on PSMs to prevent, deter and eliminate IUU fishing (Port-Lex)³⁰⁴ indicates that a multitude of States have adopted such PSMs. The EU Commission has reported that it has investigated more than 200 cases involving vessels from 27 countries since 2010 and that sanctions were imposed against vessels of Flag States such as Comoros, Lithuania, Republic of Korea

²⁹⁵ IMO Resolution A.787(19) (as amended) .

²⁹⁶ International Maritime Organisation 'Port State Control' http://www.imo.org/blast/mainframe.asp?topic_id=159

²⁹⁷ Ted L. McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 *Ocean and Coastal Law Journal* 207, 217.

²⁹⁸ Ho Sam Bang, 'Is Port State Control and Effective Means to Combat Vessel Source Pollution? An Empirical Survey of the Practical Exercise by Port States of Their Power Is of Control' (2008) 23 *International Journal of Marine and Coastal Law*, 715; Peter Bautista Payoyo, 'Implementation of international conventions through port state control: an assessment' (1994) 18(5) *Marine Policy* 379; Peter Cariou et al, 'On the effectiveness of port state control inspections' (2008) 44 *Transportation Research Part E*, 491.

²⁹⁹ Ho-Sam Bang, 'Is Port State Control and Effective Means to Combat Vessel Source Pollution? An Empirical Survey of the Practical Exercise by Port States of Their Power Is of Control' (2008) 23 *International Journal of Marine and Coastal Law*, 715. It was considered unlikely that substandard vessels were on the increase globally, as there was no parallel increase in sub-standard ships in other regions, and also unlikely that substandard vessels would be "port shopping" specifically in the Paris and Tokyo MOU subregions, as their ports are relatively well policed. This finding allows a premature conclusion to be made that sub-standard ships are being effectively dealt with by PSC measures.

³⁰⁰ For an example, see the role undertaken by port States in compliance with the *Compliance Agreement*.

³⁰¹ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 24 ILM 1542 (entered into force 11 December 2001).art 23(1): A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures....

³⁰² Jens Thielen (2013) 'What's in a Name? The Illegality of Illegal Unreported and Unregulated Fishing' *The International Journal of Marine and Coastal Law* 28, 1-18.

³⁰³ PSM IUU Agreement art 4(1).

³⁰⁴ <http://www.fao.org/fishery/psm/search/en>

and Spain, and further sanctions imposed by coastal States such as Liberia, Sierra Leone and Guinea Bissau.³⁰⁵ The validity of a PSM imposed by New Zealand to enforce a conservation measure of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) was challenged in the case of the *Paloma V*, a Namibian flagged vessel listed for IUU fishing by CCAMLR and detained and investigated in New Zealand.³⁰⁶ The court held that the New Zealand Minister for Fisheries acted lawfully in searching the vessel and seizing its computer equipment while it was in port, as the vessel was not a 'part of Namibia' and was subject to New Zealand's sovereign jurisdiction while in a New Zealand port and the Minister was acting in accordance with New Zealand law.

It must be noted that Port States have both civil and criminal law enforcement jurisdiction to enforce compliance with the terms of access to the Port when a foreign vessel is voluntarily in port. Breaches of conditions of entry could be formulated as civil liabilities against a vessel, if enacted as such in national legislation.³⁰⁷ In relation to criminal law enforcement, some doubt might be raised as to whether gaol or non-monetary penalties can be applied. Two observations made here demonstrate that they can.

First, although the LOSC limits the exercise of criminal jurisdiction in relation to marine pollution acts that occur beyond the territorial sea to imposition of monetary penalties against a foreign vessel in port,³⁰⁸ nevertheless for 'wilful and a serious acts of pollution' in the territorial sea, non-monetary penalties can still be imposed.³⁰⁹ IUU fishing can be equated with 'wilful and serious acts,' even beyond the territorial sea, i.e. in the exclusive economic zone. The PSM IUU agreement itself opens the possibility for prosecution of foreign IUU vessels where it provides that a party may allow a foreign vessel entry to its ports 'exclusively for the purpose of inspecting it and taking other appropriate actions in conformity with international law which are at least as effective as denial of port entry in preventing deterring and eliminating IUU fishing.'³¹⁰ Such measures would include criminal prosecutions and imprisonment.³¹¹

Second, the LOSC limitation on marine pollution prosecutions for acts beyond the territorial sea need not apply to other exercises of Port State jurisdiction. The LOSC marine pollution control enforcement limitation reflects only the terms agreed between the negotiating parties for the marine pollution sector 40 years ago. Criminal prosecution for non-monetary penalties is not disallowed and therefore remains available for breaches of other port access conditions, such as noncompliance with immigration, customs or fiscal preconditions, or failures to discharge outstanding debt. Port State powers to prosecute for offences against the conditions of port entry are similarly extensive.

Even if Port State prosecution powers were confined, for purposes of hypothetical argument, to parallel the powers recognised in a Port State to prosecute for marine pollution in another Coastal State's waters only at the request of that Coastal State, or to prosecute on its own initiative for marine pollution of the high seas, the Port State's enforcement powers of standards set by international agreements still attain global reach.

There are, however, limits to the legitimate exercise of PSMs. First, Port States should give advance notice of the application to foreign vessels in port of national measures that prevent IUU fishing, setting these measures in place as preconditions to its permitting foreign vessels access to its fishing ports, as noted above. Second, to preserve the customary legal right to refuge from a storm or 'force majeure', the application of PSMs to foreign vessels should be limited to those vessels voluntarily in port.³¹² (Nevertheless, even though in port involuntarily, IUU fishing vessels may be subject to confiscation of catch and equipment under EU law.)³¹³ Third, the Coastal State's principal interest in enforcing against MLR crimes in its waters translates into its primary right to do so, while a Port State's right to prosecute is subordinate to that of the Coastal State. This approach, circumscribing Port State prosecutions for marine pollution by foreign vessels that occur in the waters of another Coastal State to those actually requested by that Coastal State, could rationally be made to apply to Port State prosecutions for MLR crimes by foreign vessels that occur in the waters of another Coastal State.

The PSM-IUU Agreement

On 22 November 2009, the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (the PSM-IUU Agreement) was approved by the 91 Members of the UN Food and Agriculture Organisation

³⁰⁵ Ibid.

³⁰⁶ *Omunkete Fishing (Pty) Limited v Minister for Fisheries (No. 2)* High Court of New Zealand, CIV 2008-485-1310.

³⁰⁷ *Australian Fisheries Management Act 1991* (Cth) s 102

³⁰⁸ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 230(1).

³⁰⁹ Ibid art 230(2).

³¹⁰ PSM IUU Agreement art 9(5).

³¹¹ A contrary argument to the contrary, i.e. that vessel detention and non-monetary penal sanctions are not permitted under *United Nations Convention on the Law of the Sea* art 73, is easily refuted because by entering port voluntarily the foreign fishing vessel has submitted itself to the Port State's full sovereign jurisdiction to prescribe and enforce its laws.

³¹² Anthony Morrison (2012) *Places of Refuge for Ships in Distress: Problems and Methods of Resolution* Martinus Nijhoff.

³¹³ *Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing* [2008] OJ L 286/1, art 37.

(FAO).³¹⁴ Upon its final text being agreed upon by, the FAO described the PSM-IUU Agreement as the first ever global treaty to be focussed specifically on the problem of IUU fishing.³¹⁵ It will enter into force 30 days after a total of 25 FAO members have accepted it.³¹⁶ Within the year-long period that it was open for signature, the Agreement was signed by 22 States and the EU. Yet, to date, it has been ratified, accepted, approved or acceded to³¹⁷ by only 5 FAO members: the EU, Myanmar, Norway, Sri Lanka and Chile.³¹⁸ The lack of individual EU Member States ratifying raises the number of non-EU ratifying States required prior to its entry into force.

The PSM-IUU Agreement only prescribes minimum standards and is based on the customary powers of a Port State to control the terms of access to its port but harmonises their use of those powers to implement PSMs against foreign fishing vessels in an attempt to deter IUU fishing.³¹⁹ The PSMs to be implemented by Port States under the PSM-IUU Agreement include the requirements to:

- Designate ports for the landing of vessels (art 7.1);
- Publicise the port to which vessels may request entry (art 7.1);
- Provide minimum standard fishing vessel information prior to it being granted entry to port (art 8);
- Deny a fishing vessel access to port if there is sufficient information to prove that the vessel has engaged in IUU fishing (art 9.4), unless the vessel is allowed entry exclusively for the purpose of other punitive action which is at least as effective as denial of entry (art 9.5);
- Prohibit the landing and transshipping of IUU fish catch (art 11.1);
- Prohibit port services to vessels that have engaged in fishing activity in contravention of fishing regulations (art 11);
- Inspect fishing vessels, particularly where there are reasonable grounds for suspecting involvement in IUU fishing activity (art 12);
- Notify the Flag State (art 18.1); and
- Carry out enforcement measures (art 18.3).

In relation to enforcement measures, the Article 18.3 of the PSM-IUU Agreement explicitly provides that the treaty does 'not prevent a party from taking measures that are in conformity with international law in addition to those specified'. These measures could conceivably include vessel detention and the seizure of catch and/or gear.³²⁰ Moreover, beyond the provisions of the PSM-IUU Agreement, civil penalties and criminal prosecutions of vessels breaching the conditions of entry are within the power of the Port State.

If the PSM-IUU Agreement does not enter into force, then the primary international legal instrument governing PSM-IUU measures is the non-binding scheme of recommendations set out in the *Model Scheme on Port State Measures to Combat IUU Fishing*, adopted by the FAO Committee on Fisheries in 2005. In contrast with Article 18.3 of the PSM-IUU agreement, the Model Scheme provides that the Port State may take other actions against IUU fishing vessels with the consent of, or upon the request of, the Flag State.³²¹ If interpreted as a comprehensive statement of the enforcement options available to the Port State, the Model Scheme would purport to limit the range of enforcement measures available. However, the Model Scheme is not a legally binding document and it also explicitly provides that nothing in it affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.³²²

Comparison of IMO PSM and FAO PSC Regimes

There are many areas of convergence between the current global Port State regimes to combat IUU fishing and pollution, as well as some divergences that tend to occur where the pollution prevention regime has greater prescriptive specificity, such as quantified standards, in contrast to the generalised qualitative approaches of the IUU fishing regimes. This might be explained by the longer history of and developmental period for the PSC regime to prevent pollution under the auspices of the International Maritime

³¹⁴ FAO, *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Res 12/2009, 36th sess, FAO Doc C 2009/LIM/11-Rev.1 (18-23 November 2009). The PSM-IUU Agreement was approved under art XIV(1) of the FAO Constitution.

³¹⁵ FAO, 'New treaty will leave 'fish pirates' without safe haven' (News article, 1 September 2009)

<<http://www.fao.org/news/story/it/item/29592/icode/>>.

³¹⁶ PSMA-IUU Agreement art 29.

³¹⁷ Myanmar and Sri-Lanka were not original signatories and, therefore, acceded to the treaty. Accession relates to States or regional economic integration organisations that did not sign the PSM-IUU Agreement when it was open for signature from 22 November 2009.

³¹⁸ Angola, Australia, Benin, Brazil, Canada, Chile, France, Gabon, Ghana, Iceland, Indonesia, Kenya, Mozambique, New Zealand, Norway, Peru, Russia, Samoa, Sierra Leone, Turkey, United States of America, Uruguay and the EU. Individual member countries of the EU have neither signed nor ratified the PSM-IUU Agreement as the EU exercises its competences on their behalf under its constitutional agreements, binding the EU Commission and its (currently) 28 EU member countries. An EU exception is France, which has external territories beyond European Union jurisdiction and has independently signed and ratified the PSM-IUU Agreement.

³¹⁹ Blaise Kuemlangan and Michael Press, 'Preventing, Deterring and Eliminating IUU Fishing' (2010) 40(6) *Environmental Policy and Law* 262.

³²⁰ Audrey Sharp, *The effectiveness or not of the new port State measures in the battle to control illegal, unregulated and unreported fishing* (2 October 2010) Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140528>.

³²¹ Model Scheme, Provision 5.

³²² Model Scheme, Provision 10.

Organisation. The following points of divergence are those where pollution control standards may have advanced beyond those to prevent IUU fishing.

1. *Advance Notice*: Fishing ports are to be provided with notice of a foreign fishing vessels intended access, together with requisite information,³²³ sufficiently in advance so as to allow adequate time for the port state to examine the information.³²⁴ Shipping ports are to be provided with required information at least 24 hours before intended arrival or, in the case of ships eligible for an expanded inspection, at least 72 hours in advance.³²⁵
2. *Inspection Rates*: Minimum inspection sampling rates are higher for ships than for fishing vessels. Under the PSM-IUU Agreement, the inspection rate is required merely to be 'sufficient'.³²⁶ In contrast, for ships, they range from 10% to 50% and, in the Mediterranean and Asia-Pacific regions, Port State authorities are shifting from a percentage rate to a ship risk profile basis, (i.e. based upon whether a ship is listed on a black, white or grey list and the number of deficiencies or detentions recorded within the past 36 months).³²⁷
3. *Initiating Inspection*: There is no direct parallel for IUU fishing vessels of the process of initiating a ship inspection on the basis of information provided by another Port Authority or by third party, in addition to the initiative of the Port Authority itself.³²⁸
4. *Detailed Inspection*: The protocol for shifting from general to a detailed vessel inspection is more explicit for ships than for fishing vessels. Ships are to be given a detailed inspection if there are 'clear grounds' as indicated by detailed prescribed criteria³²⁹ for believing that they do not substantially meet the Port State requirements.³³⁰
5. *Remedial Report*: A Flag State is to provide a detailed report in the required format on action taken to remedy the deficiencies of a ship on its register.³³¹ The Flag State of a fishing vessel is required to provide a report but no detail is specified.³³²
6. *Restore Good Standing*: Black, grey and white listing of vessels has been utilised for vessel pollution risk assessment in some regions (North-east Atlantic and Asia-Pacific, although not provided for in the IMO resolution that sets standards for Port State controls). A ship's standing is restored three months following the rectification of its deficiencies, as determined by a Port State Authority, so that it will not be denied future entry into regional ports.³³³ There is no provision for the restoration of good standing of a fishing vessel.

GLOBAL VESSEL BLACKLIST AND PORT STATE MEASURES

A blacklist is a list of people or organisations regarded as suspicious, untrustworthy or unacceptable and, therefore, marked for exclusion or for withdrawal of privileges.³³⁴ Increasingly, vessel blacklists are being used, particularly in relation to IUU fishing, to identify vessels that will attract the exercise of port State measures.

The use of blacklists to identify vessels breaching legal standards for MLR conservation has its origins in the practice of regional fisheries management organisations and is well established and expanding practice.

The first regional blacklist was adopted in the early 1980s by the Pacific Islands Forum Fisheries Agency in the form of a "Good Standing" list of fishing vessels authorised to fish in the exclusive economic zones of its member States.³³⁵ The concept was subsequently transferred to most other regions, with many further RFMOs adopting blacklists around 2006, largely in the form of IUU Vessel lists. The original singular privilege that blacklisted vessels were excluded from was the opportunity to apply for a fishing licence that might be granted by a coastal State to foreign vessels to fish in its waters. However, by 2011, blacklisted vessels were excluded also from access to port facilities; or if granted access to port, their catch and gear could be confiscated, they could not change crew or be provisioned with fuel or other services, or land or tranship fish or have their catch certificates and documentation validated.³³⁶

³²³ PSM-IUU Agreement, Annex A.

³²⁴ PSM-IUU Agreement, Art 8.2.

³²⁵ Paris MOU, s. 3.1 and Annex 12.

³²⁶ PSM-IUU Agreement, Art 12.

³²⁷ Paris MOU, Annex 7.

³²⁸ IMO Resolution A.787(19) (as amended).

³²⁹ IMO Resolution A.787(19) (as amended) Para 1.6.1.

³³⁰ IMO Resolution A.787(19) (as amended) Para 3.2.

³³¹ IMO Resolution A.787(19) (as amended) Para 5.2.1.

³³² PSM-IUU Agreement, Art 20.5.

³³³ E.g. Paris MoU, s 4.1.

³³⁴ Concise Oxford Dictionary

³³⁵ For a current list of such vessels, see: <https://www.ffa.int/node/42/>

³³⁶ An extensive list of privileges from which blacklisted third country vessels are excluded is set out in *Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing* [2008] OJ L 286/1, art 37:

To date, fishing vessel blacklists have been adopted by the members of the Pacific Islands Forum Fisheries Agency, Inter-American Tropical Tuna Commission (IATTC), the Indian Ocean Tuna Commission (IOTC), Western and Central Pacific Fisheries Commission (WCPFC); North East Atlantic Fisheries Commission (NEAFC); Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR); International Commission for the Conservation of Atlantic Tunas (ICCAT); North Atlantic Fisheries Organisation (NAFO) and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). Several of these RFMOs have linked vessels on their blacklists with PSMs sanctioning those blacklisted vessels by withdrawal of their port access or port services.³³⁷

Any Port State can institute its own blacklist of vessels engaged in MLR crimes. Individual national Port State action can be significant if the country is a major fish processing or fish consuming destination, as are the EU, Japan and United States. For example, the European Union has created a blacklist under its Regulation on IUU Fishing.³³⁸ The EU blacklist includes IUU vessels listed by RFMOs on their respective IUU lists.³³⁹ It will also establish the EU's own blacklist,³⁴⁰ compiled from data concerning: compliance; catch data; trade information; vessel registers; RFMO catch documents and statistical programmes; reports on sightings of presumed IUU vessels; information obtained in ports for fishing grounds; and other relevant information provided by EU Member States.³⁴¹

The EU approach in creating its own blacklist is worthy of special mention because it is unique in its provision for due process in the nomination of vessels to the blacklist. The administration of natural justice in the listing process would have been a politically weighty consideration due to the likelihood of its listing vessels that are actually owned or operated by nationals of the EU Member States. The process requires that vessel owners and/or operators will be notified in advance of the proposed listing, together with reasons and evidence for it, and given an opportunity to respond and make an opposing case.³⁴² However, as yet, the EU has not utilised this process to place any vessels on its own blacklist but has merely compiled those generated by RFMOs.³⁴³

The EU approach would appear to shield owners and/or operators of suspected IUU vessels, rather than targeting them. Regulation 1005/2008 defines a 'Community fishing vessel' as 'a fishing vessel flying the flag of a Member State and registered in the

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- IUU vessels flying the flag of a third country shall not be authorised to fish in Community waters and shall be prohibited to be chartered;
 - IUU vessels flying the flag of a third country shall not be authorised to enter into an EU port, except in case of *force majeure* or distress;
 - IUU fishing vessel may be authorised to enter port on the condition that the catch on board and fishing gear prohibited pursuant to conservation and management measures adopted by RFMOs are confiscated, and this confiscation is mandatory even if the vessel was authorised to enter for reason of *force majeure* or distress;
 - IUU fishing vessels flying the flag of a third country shall not be authorised to change the crew, except as necessary in case of *force majeure*;
 - IUU fishing vessels flying the flag of a third country shall not be supplied in ports with provisions, fuel or other services, except in case of *force majeure*;
 - IUU fishing vessels with no fish and crew on board shall be authorised to enter a port for its scrapping, but without prejudice to any prosecution and sanctions imposed against that vessel and any legal or natural person concerned;
 - Fishing vessels flying the flag of an EU Member State shall not in any way assist, engage in fish processing operations or participate in any transshipment or joint fishing operations with fishing vessels on the IUU vessel list;
 - Importation of fishery products caught by such vessels shall be prohibited, and accordingly catch certificates accompanying such products shall not be accepted or validated;
 - Exportation and re-exportation of fishery products from IUU vessels for processing shall be prohibited.

³³⁷ The IATTC adopted a resolution to establish a list of vessels presumed to have carried out IUU tuna fishing activities in the Eastern Pacific Ocean (IATTC, 'Resolution to Establish a List of Vessels Presumed to have Carried out IUU Fishing Activities in the Eastern Pacific Ocean' (Resolution C-05-07)).

- The IOTC also adopted a resolution on establishing a list of IUU tuna fishing vessels in the Indian Ocean region (IOTC 'Resolution 06/01 on Establishing a List of Vessels Presumed to Have Carried Out IUU Fishing in the IOTC Area'). Parties and cooperating non-contracting parties are to ensure that vessels on the list not allowed to land, tranship, refuel or otherwise service their vessels in port (IOTC Resolution 11/03 (Para 16b)).

- The ICCAT has established a blacklist of IUU vessels (ICCAT, 'Recommendation by ICCAT to Establish a List of Vessels Presumed to have Carried out IUU Fishing Activities in the ICCAT Convention area' (Recommendation 06-12).) It proposes to deny entry to port and use of port facilities to vessels suspected of IUU fishing and it has already banned landings and transshipments by vessels presumed to have undermined its conservation measures.

- The NAFO blacklists IUU vessels and denies them access to ports or to land or tranship fish products or receive port services (NAFO 'Scheme to Promote Compliance by Non-contracting Party Vessels' (Conservation and Enforcement Measures), Chapter VI, Art. 58).

- The CCAMLR also requires its parties to deny port access (CCAMLR 'Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures' (Conservation Measure 10-06 (2006)).

- The WCPFC has also established a blacklist of vessels that are not authorised to land, tranship, refuel or resupply in the ports of members and cooperating parties (WCPFC 'Conservation and Management Measure to Establish a List of Vessels Presumed to have Carried Out IUU Fishing Activities in the WCPO' (Conservation and Management Measure 2007-03, 7 December 2007)).

³³⁸ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L 286/1, art 25.

³³⁹ Ibid art 30.

³⁴⁰ Ibid art 27.

³⁴¹ Ibid art 25.

³⁴² Ibid art 27(2).

³⁴³ Commission Implementing Regulation (EU) No 627/2013 of 15 July 2013 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing [2013] OJ L 193/6.

Community,³⁴⁴ thereby not including vessels that are owned or operated by persons or entities in an EU Member State, although flagged elsewhere. For example, the IUU vessel *Paloma V*, mentioned above, was flagged in Namibia but principally Spanish owned, through a joint venture of companies registered in Uruguay and Namibia.³⁴⁵ Although the EU vessel blacklist is to include information on the vessel owner, beneficial owner and operator (and previous owners and operators, where relevant),³⁴⁶ it does not require that vessels be included on the list because of the owner's and/or operator's past IUU fishing activities. In contrast, the IAATC and WCPFC IUU blacklists are extended on the premise that any vessel under the control of an owner of a vessel already on the list is to be added to the list, effectively listing all vessels under the control of a non-compliant owner.³⁴⁷ Although IATTC and WCPFC have not yet implemented these provisions, an approach to blacklisting that pierces through the corporate veil and the flag of convenience is a progressive development in the global fight against IUU fishing.

A major challenge in the maintenance of a blacklist is that of accurately identifying vessels over time. Vessel owners and operators can readily hide the history and disguise the past identities of their vessels by changing their name, flag, registration, colour, master and crew or holding company. There is commercial value for flag states, port authorities and ship chandlery in providing these services promptly and without publicity. Consequently, it can be difficult to track the identity of a vessel with a history in MLR offences.

A proposed regulatory response to render the disguised identities of fishing vessels transparent is to create a global registry of vessels. The FAO is seeking to establish a Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (the 'Global Record') based on a unique universal identifying number allocated to every fishing vessel in the world. Each vessel numbered on the Global Record would be associated with a database providing information about its history, ownership and management, permits and authorisations, ports of visit, catch record, inspections, history of infractions, etc. The IMO introduced a ship identification number scheme in 1987 which became mandatory in 1996 for all merchant ships.³⁴⁸ The FAO approved the Global Record project in 2009 and, given estimates that there are about 4.36 million fishing vessels in the world (73% in Asia), it is as yet in the early stages of the project, i.e. promoting political support and soliciting funding for its implementation.³⁴⁹

Less comprehensive or reliable, but quicker, simpler and cheaper, would be a formal process to link up IUU databases of RFMOs. This could create a global patchwork list of IUU blacklisted vessels across the world. Interregional linkages between databases of non-compliant vessels for the purposes of pollution and safety control are already used, as the information concerning substandard vessels exchanged through regional secretariats (established under regional Memoranda of Understanding on Port State Controls over a vessel safety and pollution) is made available to other regional secretariats from their respective databases. Regional blacklists could easily be compiled into a global one.

The PSM-IUU Agreement does not require the establishment of a global blacklist but, instead, mandates the foundations be built for blacklisting. It encourages its parties to establish information sharing, preferably coordinated by FAO,³⁵⁰ using an electronic information sharing mechanism,³⁵¹ to transmit the results of each inspection to the Flag State, RFMOs, the FAO and other relevant international organisations.³⁵² Once established, electronic information sharing mechanisms under the PSM-IUU Agreement could be used for sharing information through the FAO on vessels not in good standing.

Instituting a global blacklist of vessels engaged in MLR – i.e. beyond those related to IUU fishing – would be more difficult than formulating a global blacklist simply for IUU fishing. This is because there is no counterpart framework of treaties for MLR crimes that provide an infrastructure for the creation of vessel blacklists and no extant regional blacklists of MLR harming vessels. The relevant wildlife and biodiversity conservation treaties are not specific to vessels, ports or MLR, nor do they provide an infrastructure for vessel blacklists. Substantial treaty innovation would be needed to craft the necessary legal framework specific to a global vessel blacklist of vessels engaged in wildlife and biodiversity crimes, to build up a global framework for Port State measures against vessels connected with these MLR crimes, and to interconnect them.

It would seem more efficient, instead, to craft extensions concerning MLR crimes onto a global IUU fishing vessel blacklist. The linkages between IUU fishing operations and fishing vessel activities that harm wildlife and biodiversity are extensive. They include not only targeted IUU fishing operations, but also by-catch, ghost fishing and habitat destruction by fishing vessels. Therefore, it is

³⁴⁴ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L 286/1, art 2(6).

³⁴⁵ Ibid art 37 provides that: Member States shall refuse the granting of their flag to IUU fishing vessels; IUU vessels flying the flag of a Member State shall only be authorised access to their home ports; Flag Member States shall not request fishing authorisations in respect of IUU fishing vessels; and current fishing authorisations issued by Flag Member States in respect of IUU fishing vessels shall be withdrawn.

³⁴⁶ Ibid art 29(1): The Community IUU vessel list shall contain the following details for each fishing vessel: (a) name and previous names, if any; (b) flag and previous flags, if any; (c) owner and where relevant previous owners, including beneficial owners, if any; (d) operator and where relevant previous operators, if any; (e) call sign and previous call signs, if any; (f) Lloyds/IMO number, where available; (g) photographs, where available; (h) date of first inclusion on it; (i) summary of activities which justify inclusion of the vessel on it...'

³⁴⁷ IATTC Resolution C-11-09; WCPFC Conservation and Management Measure 2010-06, para. 3J and Annex A

³⁴⁸ IMO Res. A.600(15).

³⁴⁹ FAO, *Global Record of Fishing Vessels Refrigerated Transport Vessels and Supply Vessels* <<http://www.fao.org/fishery/global-record/en>>

³⁵⁰ PSM IUU Agreement, art 16.

³⁵¹ PSM IUU Agreement, Annex D.

³⁵² PSM IUU Agreement, art 15.

feasible to extend a global IUU fishing vessel list to include vessels that engage in MLR crimes, even though not the product of IUU fishing.

Additional other harms to wildlife and biodiversity emanating from vessel activities include habitat destruction from waste disposal, cleaning, pollution, lost cargoes, anchoring, cavitation, soundings, marine pest introduction and leaching of toxic hull coatings. These harms are largely addressed through the regional regimes of Port State controls to combat marine pollution and maritime hazards that regulate merchant vessels. These vessels do not generally use fishing ports and, as they are separately regulated, need not be included in a global blacklist sanctioning vessels for MLR crimes.

GLOBAL NON-COOPERATING COUNTRY LIST

A non-cooperating country is one that fails to discharge its duties under international law to prevent MLR crimes fishing under its jurisdiction. Most often, its jurisdiction will arise in its role as Flag State in respect of its duties to regulate vessels under its flag to prevent MLR crimes. However, international duties to exercise jurisdiction to prevent MLR crime arise also in a country's roles as a Port State, or as a Coastal or Market State, and its consequent duties to exercise its jurisdiction over persons, vessels, and corporate entities.

The PSM-IUU Agreement maintains the responsibility of Flag States over their vessel's actions by placing duties on Flag States to follow up PSMs with enforcement actions in certain circumstances.³⁵³ The Flag State also has supplemental roles that facilitate PSMs, include by requesting a Port State to inspect a vessel flying its flag, and by ensuring that its vessels cooperate with Port State authorities undertaking inspections.³⁵⁴ If the Flag State fails to meet its responsibilities, placing it on a global list of non-cooperating countries could diminish its opportunities to flag vessels and to engage in MLR trade and other related activities, as well as diminishing its status as responsible member of the international community.

Typically, measures against non-cooperating countries take the form of trade sanctions, such as a ban on importations, investments or joint contracts. A global non-cooperating country list could identify countries to be subjected to Port State measures. This would affect primarily Flag States and the vessels flying their flags, which would be excluded from the privileges of port access and services.

The exclusion of listed non-cooperating countries from port might be considered as contrary to the principle that Port or Coastal State measures should not discriminate against vessels of a particular State or group of States. This important principle is widely applied in the international law of the sea. The LOSC mandates non-discrimination two dozen times, particularly in relation to access to coastal waters and ports.³⁵⁵ The UN Fish Stocks Agreement requires that port control measures be implemented in a manner that does 'not discriminate in form or in fact against the vessels of any State' when taking measures to promote the effectiveness of subregional, regional and global conservation and management measures.³⁵⁶ Similarly, the PSM-IUU Agreement provides that it 'shall be applied in a fair, transparent and non-discriminatory manner, consistent with international law'³⁵⁷ and the IPOA-IUU also requires fair, transparent and non-discriminatory measures.³⁵⁸

However, fair and transparent application of measures that target a particular country are widely accepted in international law. The point of distinction is that 'discrimination' means 'arbitrary discrimination.' Arbitrary discrimination involves withholding privileges available to other countries participating in a regime for reasons that are unrelated to the agreed objectives for which the regime was instituted.³⁵⁹

³⁵³ Under the PSM-IUU Agreement, art 20, if a Flag State is informed that a vessel flying its flag has been denied access to a port on the grounds that the vessel has been involved in IUU fishing activity, or if it is informed that an inspection has been done on a vessel flying its flag that has revealed that there are sufficient grounds for believing that the vessel has been involved in IUU fishing, the Flag State is to investigate the matter fully and take enforcement action without delay.

³⁵⁴ PSM-IUU Agreement art 20.

³⁵⁵ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 24.

³⁵⁶ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 24 ILM 1542 (entered into force 11 December 2001) art 23(3).

³⁵⁷ PSM-IUU art. 3.4.

³⁵⁸ IPOA-IUU para. 52.

³⁵⁹ Non-arbitrary discrimination targeting a country that demonstrates a consistent pattern of wilful non-compliance with the legal standards applicable within the regime under which it will be blacklisted, through a process that is fair and transparent, is not arbitrary discrimination. It is only arbitrary discrimination that is unlawful.

CONCLUSION

The powers of a Port State under customary international law enable Port States to set conditions for entry into port (subject to reasonable advance notice and international agreements) open a new frontier in the struggle to combat MLR crime and IUU fishing. Relying on the protective principle in international law, which allows the Port State to prescribe conditions of entry into port, even conditions that seek to protect marine living resources beyond its territorial sea and exclusive economic zone, the Port State can exercise of enforcement jurisdiction against foreign vessels voluntarily entering its ports.

A significant opportunity to universalise that exercise of enforcement jurisdiction is pending in the form of a global blacklist that would deny the use of port facilities for any blacklisted vessel. To be placed upon the blacklist, a vessel should be in breach of, or strongly suspected of being in non-compliance with specified conservation and management norms. A global MLR blacklist could leverage off regional lists already established by RFMOs. To facilitate the identification of MLR crimes that are distinct from IUU crimes, the global blacklist might comprise schedules specific to particular categories of offences. A systematic process of consultative inter-regional workshops might facilitate coordination to compile the blacklist.

A global MLR blacklist should pierce the corporate veil and the disguise of flags of convenience. Therefore, the blacklist should include in its scope those vessels under common management with vessels conducting illegal activities, those actively supporting a breach or non-compliance, as well as those directly engaged in such activities. A common management relationship with another vessel directly engaged in breach or non-compliance would encompass common ownership, common operating company, common master or crew with vessels directly engaged or actively supporting IUU fishing. Direct engagements in illegal or non-compliant activities might be established by evidence proven on the balance of probabilities of past vessel breaches. Active support could be established by evidence of past support, such as transshipment, bunkering or servicing, with any vessel suspected of direct breaches.

The formal establishment of a global blacklist of IUU vessels could be facilitated in a number of ways:

1. A common resolution by each RFMO to compile information and generate a global list;
2. A resolution under the PSM-IUU Agreement upon its coming into force, or by its negotiating parties prior to its coming into force;
3. A resolution under the 1995 Fish Stocks Agreement; or
4. An resolution under the FAO Committee on Fisheries and Assembly.

An advantage of approaches 2, 3 and 4 is that they could serve to foster the compilation of blacklists that cover irresponsible unregulated or unreported fishing in gap areas between RFMO regions, i.e. where no relevant RFMO has yet been established or created a blacklist. However, as the FAO Global Record is a long way from realisation and yet to be proven, the compilation of information from existing RFMO blacklists seems a sure place to start.

From a comparison of the practice of Port States in exercising controls over vessel pollution and safety, we can identify some improvements that might be made to PSMs for IUU fishing: the requirements for advance notice by foreign fishing vessels prior to intended port entry could be quantified; inspection sample rate requirements might shift from a percentage rate to a fishing vessel risk profile basis; inspections could be initiated on the basis of information provided by another Port Authority or by a third party; protocols for detailed inspections could be defined; more specificity could be required of the reports Flag States are to make on actions they take to remedy non-compliance; and criteria could be set for the restoration of good standing of a fishing vessel.

To discourage the use of flags of convenience, in particular, a non-cooperating Flag State blacklist could be compiled. Naming on the list might diminish the public international status of the non-cooperating Flag State and also result in its disadvantage in terms of port access, flagging, joint-venture and MLR trade opportunities.

The full range of enforcement powers is available to the Port State under customary international law and existing treaties to enforce against vessels voluntarily and its ports for the commission of MLR crimes. Therefore, the Port State can impose civil penalties and vessel forfeitures and also institute criminal prosecutions entailing non-monetary penalties such as imprisonment.

Although Port State measures can be applied by any port state individually, the exercise of Port State enforcement jurisdiction against vessels associated with MLR crimes will be more effective if it is applied consistently at national, regional and global levels and in accordance with international law. Imposed across Port States in coordination, PSMs would be more likely to have the effect of isolating and restricting the opportunities of non-compliant vessel owners and operators and Flag States. Therefore, the construction of consensus with like-minded Port States on a common program for the coordinated imposition of an expanded program of PSMs must be an important part of any future strategy to universalise jurisdiction for better protection against MLR crime.

CHAPTER 9.

HIGH SEAS BOARDING AND INSPECTION OF FISHING VESSELS

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The fisheries enforcement framework, codified in the United Nations Convention on the Law of the Sea ('LOSC'), is based on a careful balance between the sovereignty (internal waters, archipelagic waters, territorial seas) and sovereign rights (exclusive economic zones) of coastal States on one hand and flag States on the other on the high seas. In maritime zones under sovereignty, LOSC does not impose any limitations on the enforcement powers of coastal States with regard to fisheries offences committed by foreign fishing vessels. In the EEZ, LOSC gives power to coastal States to board, inspect, arrest foreign fishing vessels and take judicial proceedings to ensure compliance with their fisheries laws and regulations.³⁶⁰ LOSC also leaves it each coastal State to define what constitutes fishing and fisheries offences in accordance with its fisheries laws and regulations.

On the high seas, however, the dominant rule is freedom of fishing on the high seas,³⁶¹ subject to a few limitations, including treaty obligations and the rights and jurisdiction on coastal States in their EEZs.³⁶² The high seas fisheries enforcement framework under LOSC also mirrors the traditional framework codified in Article 92(1) of LOSC.³⁶³ Under LOSC. It is the sole duty of flag States to take measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.³⁶⁴ This leaves it to each flag State to define what constitutes a fisheries crime on the high seas.

UN FISH STOCKS AGREEMENT AND ORIGINS OF HIGH SEAS BOARDING AND INSPECTION

Global dissatisfaction with the ability of the LOSC high seas fisheries framework to deliver an effective conservation and management outcome in the 1990s resulted in the convening of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, which adopted the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (UN Fish Stocks Agreement)³⁶⁵ on 4 August 1995. The objective of the UN Fish Stocks Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the LOS Convention.³⁶⁶

³⁶⁰ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 73(1).

³⁶¹ *Ibid* art 87.

³⁶² *Ibid* art 116.

³⁶³ *Ibid* art 92(1). 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.'

³⁶⁴ *Ibid* art 117.

³⁶⁵ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 24 ILM 1542 (entered into force 11 December 2001). The Parties are: Australia, Austria, Bahamas, Barbados, Belgium, Brazil, Canada, Cook Islands, Costa Rica, Cyprus, Denmark, European Community, Fiji, Finland, France, Germany, Greece, Iceland, India, Iran (Islamic Republic of), Ireland, Italy, Luxembourg, Maldives, Malta, Marshall Islands, Mauritius, Micronesia (Federated States of), Monaco, Namibia, Nauru, Netherlands, New Zealand, Norway, Papua New Guinea, Portugal, Russian Federation, Saint Lucia, Samoa, Senegal, Seychelles, Solomon Islands, South Africa, Spain, Sri Lanka, Sweden, Tonga, Ukraine, United Kingdom on behalf of its Territories, United States of America, Uruguay.

³⁶⁶ *Ibid* art 2.

A cardinal feature of the UN Fish Stocks Agreement is the attempt to universalise high seas fisheries crimes and its enforcement. This was done through the establishment of a treaty framework for high seas boarding and inspection and, for the first time in international law, the definition of what may be characterised as high seas fisheries crimes. The high seas boarding and inspection provisions under the UN Fish Stocks Agreement are spelt out in Articles 21-22 of the Agreement.

Before the negotiation of the UN Fish Stocks Agreement, three Regional Fisheries Management Organizations, namely: Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR); North Atlantic Fisheries Organization (NAFO) and the North East Atlantic Fisheries Commission (NEAFC) implemented schemes for inspection of member vessels on the high seas.³⁶⁷ However, these pre-UN Fish Stocks Agreement schemes were limited in their scope and did not define common standards for definition of fisheries crimes by RFMOs.

The scope of the High seas boarding and inspection framework under the UN Fish Stocks Agreement extends beyond the State parties to the Agreement to also include members of or participants in a relevant regional or sub-regional fisheries management organization or arrangement Article 21(1) provides:

In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organization or a participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement.

Serious Violation

For the purpose of this study, the most significant aspects of the high seas boarding and inspection framework under the UN Fish Stocks Agreement is that, for the first time in international fisheries law, there is specification of certain fishing activities and practices which can be characterised as criminal behaviour. These infractions are described as 'serious violations' under the UN Fish Stocks Agreement. Include (Art. 21(11)).

- fishing without a valid licence, authorization or permit issued by the flag State;
- failing to maintain accurate records of catch and catch-related data, as required by the relevant subregional or regional fisheries management organization or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organization or arrangement;
- fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant subregional or regional fisheries management organization or arrangement;
- directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;
- using prohibited fishing gear;
- falsifying or concealing the markings, identity or registration of a fishing vessel;
- concealing, tampering with or disposing of evidence relating to an investigation;
- multiple violations which together constitute a serious disregard of conservation and management measures; or

The various activities listed in Article 21(11) of the UN Fish Stocks Agreement as constituting 'serious violations' almost mirror the definition of fisheries crimes under most national fisheries legislation for violations in maritime zones under sovereignty and sovereign rights. It is also worth noting that the list of activities constituting "serious violation" is not exhaustive. Article 21(11) (i) allows regional fisheries management organizations, in their implementation of the Agreement, to specify other infractions which may constitute 'serious violations.'

The practical consequences of a fishing vessel committing a 'serious violation' are spelt out in Article 21(8) of the UN Fish Stocks Agreement:

Where, following boarding and inspection, there are clear grounds for believing that a vessel has committed a serious violation, and the flag State has either failed to respond or failed to take action as required under paragraphs 6 or 7, the inspectors may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port, or to such other port as may be specified in procedures established in accordance with paragraph 2. The inspecting State shall immediately inform the flag State of the name of the port to which the vessel is to proceed. The inspecting State and the flag State and, as appropriate, the port State shall take all necessary steps to ensure the well-being of the crew regardless of their nationality....

³⁶⁷ See: Convention on the Conservation of Antarctic Marine Living Resources, opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982), part 9; NAFO- (2/88) Resolution determining the Date on which the Proposal establishing the Modified Scheme of Joint International Enforcement to be entitled "Scheme of Joint International Inspection" shall become a Measure Binding on all Contracting Parties, adopted by the Fisheries Commission on 10 February 1988; NEAFC Chap IV Inspections at sea (art 15-19) of Scheme of Control and enforcement

Implementation through Regional Fisheries management Organizations

State parties to the UN Fish Stocks Agreement, in accordance with their duty to cooperate to manage straddling fish stocks and highly migratory fish stocks under LOSC, are required to 'establish, through subregional or regional fisheries management organizations or arrangements, procedures for boarding and inspection.'³⁶⁸ Article 21(3) of the UN Fish Stocks Agreement outlines default procedures for regional fisheries management organizations that fail to establish their own high seas boarding and inspection procedures within two years of the adoption of the UN Fish Stocks.³⁶⁹

CASE STUDY OF THE WCPFC

To-date, the Western and Central Pacific Fisheries Commission (WCPFC) is the only comprehensive implementation of the UN Fish Stocks Agreement high seas boarding and inspection framework. The WCPFC was created under the Convention on the Conservation and Management of Highly Migratory Fish Stocks (WCPFC Convention) in the Western and Central Pacific Ocean (WCPFC Convention) (2000) entered into force in June 2004, creating the first regional fisheries management organizations to be established since the adoption in 1995 of the UN Fish Stocks Agreement.

The objective of the WCPFC Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the Western and Central Pacific Ocean in accordance with the 1982 United Nations Convention on the Law of the Sea and the 1995 UN Fish Stocks Agreement. The current members³⁷⁰ and cooperating non-members³⁷¹ of the WCPFC, comprising all the major distant water fishing nations and all coastal States in the Western and Central Pacific Ocean, have mandate to manage about 60 per cent of global tuna catches. Consequently, the practice of WCPFC with regard to high seas boarding and inspection, has global significance in State practice.

Article 26(1) of the WCPFC Convention creates an obligation on members of the WCPFC to establish high seas boarding and inspection procedures to ensure compliance with conservation and management measures adopted by the Commission and requires the adoption of a specific conservation and management measure to give effect to this obligation. Under Article 26(2) of the WCPFC Convention if the Commission was unable to agree on such procedures (or an alternate mechanism) within two years from the entry into force of the WCPFC Convention (which was 19 June 2004), then Articles 21 and 22 of UN Fish Stocks Agreement would apply as the default high seas boarding and inspection scheme for the WCPFC. Pursuant to the obligation in Article 26 of the WCPFC Convention, WCPFC adopted *The High Seas Boarding and Inspection Procedures* (Conservation and Management Measure 2006-08), setting out detailed provisions for the boarding and inspection of fishing vessels flying the flags of members and cooperative non-members of the Commission and fishing on the high seas in the Convention Area.

Serious Violation

Consistent with the UN Fish Stocks Agreement, the WCPFC High Seas Boarding and Inspection Procedures make special procedures for dealing with "serious violations" during a high seas boarding and inspection by authorised inspectors. The WCPFC also significantly expands of the scope of offences constituting "serious violation". Where an authorised inspector observes an activity or condition that would constitute a serious violation, the authorities of the inspection vessels are required to immediately notify the authorities of the fishing vessel, directly as well as through the Commission. A 'serious violation' is defined broadly in paragraph 37 to include the following violations of the provisions of the Convention or conservation and management measures adopted by the Commission:

- fishing without a license, permit or authorization issued by the flag Member, in accordance with Article 24 of the Convention;
- failure to maintain sufficient records of catch and catch-related data in accordance with the Commission's reporting requirements or significant misreporting of such catch and/or catch-related data;
- fishing in a closed area;
- fishing during a closed season;
- intentional taking or retention of species in contravention of any applicable conservation and management measure adopted by the Commission; significant violation of catch limits or quotas in force pursuant to the Convention;
- using prohibited fishing gear;

³⁶⁸ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 24 ILM 1542 (entered into force 11 December 2001).art 21(2).

³⁶⁹ Ibid art 21(3)

³⁷⁰ Australia, Canada, People's Republic of China, Cook Islands, European Union, France, Fiji, Federated States of Micronesia, Japan, Kiribati, Republic of Korea, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Chinese Taipei, Tonga, Tuvalu, United States of America, and Vanuatu.

³⁷¹ Belize, Democratic People's Republic of Korea, Ecuador, El Salvador, Indonesia, Mexico, Senegal, St Kitts and Nevis, Panama, Thailand and Vietnam

- falsifying or intentionally concealing the markings, identity or registration of a fishing vessel;
- concealing, tampering with or disposing of evidence relating to investigation of a violation;
- multiple violations which taken together constitute a serious disregard of measures in force pursuant to the Commission;
- refusal to accept a boarding and inspection, other than as provided in paragraphs 26 and 27;
- assault, resist, intimidate, sexually harass, interfere with, or unduly obstruct or delay an authorized inspector;
- intentionally tampering with or disabling the vessel monitoring system;
- such other violations as may be determined by the Commission, once these are included and circulated in a revised version of these procedures.

Implementation

To ensure a transparent implementation of the High Seas Boarding and Inspection Procedures, WCPFC is required to maintain a register of all authorized inspection vessels and authorities or inspectors. Only vessels and authorities or inspectors listed on the Commission's register are authorized under the procedures to board and inspect foreign flagged fishing vessels on the high seas within the Convention Area. Each Contracting Party that intends to carry out boarding and inspection activities under the Procedures is required to notify the Commission and provide detailed information on two aspects.

First, with respect to each inspection vessel it assigns to boarding and inspection activities under the Procedures, the inspecting member is required to provide:

- the details of the vessel (name, description, photograph, registration number, port of registry (and, if different from the port of registry, port marked on the vessel hull), international radio call sign and communication capability);
- notification that the inspection vessel is clearly marked and identifiable as being on government service;
- notification that the crew has received and completed training in carrying out boarding and inspection activities at sea in accordance with any standards and procedures as may be adopted by the Commission.

Second, with respect to inspectors it assigns pursuant to the Procedures, the inspecting members is required to provide:

- the names of the authorities responsible for boarding and inspection;
- notification that such authorities' inspectors are fully familiar with the fishing activities to be inspected and the provisions of the Convention and conservation and management measures in force; and
- notification that such authorities' inspectors have received and completed training in carrying out boarding and inspection activities at sea in accordance with any standards and procedures as may be adopted by the Commission.

Table 1 below provides a summary the Members of WCPFC who have notified the Commission of their intention to participate in conducting boarding and inspection activities under the High Seas Boarding and Inspection Procedures.

Table 1: Summary the WCPFC members participating who have notified the Commission of their intention to participate in the high seas boarding and inspection procedure.

WCPFC Member Notification		Number of Vessels on the Register of Authorised Inspection Vessels (as at 29 Sept 2012)
New Zealand	YES	12
France ³⁷²	YES	9
United States of America	YES	79
Chinese Taipei		11
Papua New Guinea		4
Republic of Korea		-
Cook Islands	YES	1
Japan	YES	2
Canada		5
Australia	YES	11
Federated States of Micronesia		3
Tuvalu		1
		138

³⁷² Separate notifications were provided by France for French Authorities that are based in French Polynesia and New Caledonia

Of the 13 members of the WCPFC who have notified the commission of their intention to participate in boarding and inspection activities only five members have actually conducted high seas boarding and inspection. These members are the United States of America, French Polynesia, Chinese Taipei, New Caledonia and the Cook Islands the numbers of boarding's can be seen in table 2.

Table 2. High Seas Boarding and Inspection carried out between 20 August 2008 - 11 November 2012 by WCPFC members.

	United States of America	French Polynesia	Chinese Taipei	New Caledonia	Cook Islands
Total	65	52	2	3	5
Chinese Taipei	20	22	-	2	2
China	12	18	-	-	2
Republic of Korea	18	1	-	-	-
Japan	8	3	-	1	-
Fiji	-	5	-	-	1
USA	-	0	2	-	-
EU	1	1	-	-	-
Philippines	2	-	-	-	-
Indonesia	2	-	-	-	-
Belize	1	-	-	-	-
Singapore	-	1	-	-	-
Vanuatu	-	1	-	-	-
Kiribati	1	-	-	-	-

Since inception of the WCPFC high seas boarding and inspection procedures in 2008 the numbers have steadily risen to 49 boarding's in 2011 and 2012 looks to have a similar increase with 39 boarding's conducted by the end of September of that year. Table 3 shows the trends in boarding numbers since 2008.

Table 3. Trends in boarding numbers for WCPFC 2008-12.

Year	Number of Boarding's
2008	7
2009	3
2010	28
2011	49
2012	39
Total	126

Conclusion

High seas boarding and inspection remains a relatively new concept in international fisheries law since its introduction in 1995 through the UN Fish Stocks Agreement. Implementation through the WCPFC highlights two important aspects of this study from a global fisheries governance perspective. The first is gradual erosion of the principle of exclusive flag State jurisdiction over its fishing vessels on the high seas. More significantly is the concept of "serious violations" is, to a large extent, is leading to global consensus on the definition of fisheries crimes on the high seas.

PART III

FINDINGS:

LEGAL MODELS AND INSTITUTIONAL VEHICLES

CHAPTER 10.

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GLOBAL LEGAL FRAMEWORK

Marine living resources (MLR) crime can be combated using both legal and institutional mechanisms. The following survey and assessment of existing mechanisms is divided between legal frameworks and institutional frameworks. Legal frameworks are subdivided according to their primary area of concern and according to their original purpose; i.e. whether they deal primarily with marine, environment, or criminal justice concerns. Although institutional bodies are often multifunctional or have the flexibility to apply themselves to emerging problems and to evolve, they have been similarly categorised according to a dominant purpose for simplified reading. Distinctions have been made between general political bodies, marine governance bodies, environmental governance bodies and crime-fighting institutions. Regional legal frameworks and institutions are considered in the following chapter and are categorised in a similar fashion.

The following survey demonstrates that, at the global level, no global legal regime specifically concerning the punishment of MLR crimes has yet been established. The survey also indicates that many more treaties and institutions criminalising some relevant aspect of MLR crimes, or potentially applicable to MLR crimes, have been developed within the legal frameworks for criminal justice than those for general political affairs, marine or environment protection. This is to be expected as crime prevention laws and institutions have long been concerned with exercising jurisdiction to enforce criminal laws. In contrast, international bodies concerned with general affairs, marine and environmental affairs are primarily concerned with standard setting rather than criminal law enforcement.

Marine Legal Framework

Legally binding global standards for the management of MLR are set out in the UN Convention on the Law of the Sea 1982, FAO Compliance Agreement 1993, UN Fish Stocks Agreement 1995, and the FAO Port States Measures Agreement 2009.

Although these global standards broadly address the conservation and management of MLR, commercial fisheries management is their primary concern. Nevertheless, fisheries management has extensive impacts across the broad range of management of other MLR. It impacts on non-target and non-fish species, whether these are affected as by-catch or are impacted by environmental pollution or by degradation of ecosystem integrity.

Fisheries treaties tend not to require criminalisation of breaches by individuals of their prescribed standards. Instead of engaging with criminal justice systems, they address breaches through managerial and administrative capacity building mechanisms. Breaches of internationally prescribed standards of conduct are treated as non-compliance problems rather than as universalised crimes.

The Port State Measures IUU Agreement

The Port State Measures Agreement (PSM-IUU Agreement) is potentially the most important global legal framework for enforcement of fisheries management and conservation laws. As noted in the case study on Port State measures, the PSM-IUU Agreement provides that the Port State may take specified enforcement measures against a vessel that has engaged in IUU fishing, including denying the use of the port for landing, transshipping, packaging and processing of fish and denying the use of other port services including refuelling and resupply, maintenance and dry docking.³⁷³

The PSM-IUU Agreement also explicitly provides that it does 'not prevent a party from taking measures that are in conformity with international law in addition to those specified'.³⁷⁴ These additional measures could conceivably include vessel detention and the seizure of catch and/or gear.³⁷⁵ Moreover, civil penalties, such as related catch and asset forfeiture, and criminal prosecutions of masters, owners and operators for breaching the publicised conditions of entry into port remain within the power of the Port State.

- ☛ The PSM-IUU Agreement provides the most relevant and potentially useful legal framework for the universalisation of MLR crimes. A protocol to the Agreement, or a declaration or resolution by the parties to it, could seek to harmonise among its parties the adoption of national criminal provisions and to universalise enforcement jurisdiction by through law

³⁷³ PSM-IUU Agreement, art 18.1(b).

³⁷⁴ PSM-IUU Agreement, art 18.3.

³⁷⁵ Audrey Sharp, *The effectiveness or not of the new port State measures in the battle to control illegal, unregulated and unreported fishing* (2 October 2010) Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140528>.

enforcement cooperation. However, as the Agreement has yet to enter into force and has many implementation hurdles to clear, a push to universalise MLR crime under it is premature at this time.

IPOA-IUU Soft Law

International standards directly governing MLR crimes are set out in non-legally binding policy instruments, with the exception of the PSM-IUU Agreement, which has not yet entered into force.³⁷⁶ These soft laws include UN Resolutions on Driftnet Fishing, UN Resolutions on Sustainable Fisheries, the 1995 FAO Code of Conduct and FAO Guidelines; i.e.: International Plan of Action on Capacity, International Plan of Action on Seabirds, International Plan of Action on Sharks, and the 2004 FAO Model Scheme on Port State Measures to Combat IUU Fishing.

The *International Plan of Action - IUU* adopted by the FAO Council in 2001 is the predominant instrument specifically addressing IUU fishing. It supplements earlier international soft law standards, such as the 1995 *FAO Code of Conduct on Responsible Fishing*, and is itself reinforced by later international instruments, including the 2005 *Rome Declaration on IUU Fishing*. Although not legally binding, the *International Plan of Action-IUU* articulates an accepted international standard requiring the penalisation of illegal fishing.³⁷⁷ It describes illegal fishing in paragraph 3.1 as referring to either activities:

- 3.1.1 Conducted by national or foreign vessels in waters under the jurisdiction of a State without the permission of that State, or in contravention of its laws and regulations;
- 3.1.2 Conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organisation [RFMO] but operate in contravention of the conservation and management measures adopted by that organisation or by which the States are bound, or relevant provisions of the applicable international law; or
- 3.1.3 In violation of national laws or international obligations, including those undertaken by cooperating States to a relevant [RFMO].

Coastal States can prescribe the precise terms of illegal fishing within their maritime zones (paragraph 3.1.1), as qualified by limits on their jurisdiction imposed under the UN Convention on the Law of the Sea 1982. In areas regulated by a relevant RFMO, which often include areas of high seas, fishing is considered illegal if it contravenes the organisation's conservation and management measures and is conducted by a vessel that is subject to those measures because it flies the flag of a State which is a member of that organisation (paragraph 3.1.2) or a State cooperating with that organisation (paragraph 3.1.3).

The use of judicial or quasi-judicial processes to enforce fisheries laws is implicitly recognised, in paragraph 17 of the IPOA-IUU, which requires that national implementing legislation address the admissibility as legal evidence of information from electronic data and new technologies. Most importantly, it provides, in paragraph 21, that a State should penalise both vessels and persons of its nationality under its jurisdiction and that the penalties should be sufficiently severe to deter IUU fishing and deprive offenders of their illicit proceeds.

- 21. States should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing fishing. This may include the adoption of the civil sanction regime based on an administrative penalties scheme. States should ensure the consistent and transparent application of sanctions.

In the penultimate sentence, the IPOA-IUU reflects international consensus that the penalty regime may be based in administrative processes or civil justice systems, rather than criminal justice alone. Therefore, it stops short of requiring that States criminalise of illegal fishing as a serious crime. Nevertheless, it provides evidence, in combination with other relevant international standards, of widespread international practice that is leading to the development of international standards to criminalise illegal fishing.

Non-legally binding norms are easier to agree upon because they are less consequential. Even so, they build consensus as to what later binding norms might look like. Normative frameworks set out in international soft law often form a preparatory basis for the later development of legally binding international standards.

- ☛ The IPOA-IUU offers a promising basis upon which to build the non-legally binding normative infrastructure for universalised MLR crime. Likelihood of success in this endeavour is better than for a legally binding framework such as the PSM-IUU Agreement.

Environmental Legal Framework

None of the multilateral environmental agreements (MEAs) that aim to resolve global environmental problems address themselves to the shaping of domestic mechanisms of criminal law or to international legal cooperation in relation to their enforcement. They

³⁷⁶ See PSM Case Study above

³⁷⁷ Fisheries treaties and policy instruments have come to distinguish between illegal fishing, unregulated fishing and unreported fishing (IUU fishing). Whereas illegal fishing designates fishing activities in breach of applicable national or international legal standards, unregulated fishing signifies fishing in an area where there are no applicable legal standards, and unreported fishing signifies a failure to report fishing activities to authorities. There is overlap between these categories, as unreported fishing is prohibited under some fisheries laws which makes it illegal fishing. However, if these activities are not prohibited, then they are not illegal.

commonly require simply that parties take the appropriate legal and administrative measures to implement and enforce their obligations under the MEA. A partial exception is the Basel Convention on Hazardous Waste, which states that illegal traffic in hazardous wastes or in other wastes is criminal.

The *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes*³⁷⁸ regulates the transboundary movements of hazardous wastes and imposes obligations on its Parties to ensure that such wastes are managed and disposed of in an environmentally sound manner. The *Basel Convention on Transboundary Movements of Hazardous Wastes* is the only MEA to specifically provide that illegal traffic is a criminal activity. Article 9 defines illegal traffic and requires its criminalisation:

1. For the purpose of this Convention, any transboundary movement of hazardous wastes or other wastes:
 - (a) without notification...; or
 - (b) without the consent ... of a State concerned; shall be deemed to be illegal traffic....
5. Each Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic.

Article 4 emphasises that:

3. The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal.
4. Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.

At the Sixth Conference of Parties, in 2002, the Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes were adopted.³⁷⁹ These Guidance Elements are intended to provide a practical guide to assist enforcement of national laws implementing the Basel Convention. Part VII of the Model National Legislation developed by the Basel Convention Legal Working Group contains model provisions criminalising illegal trafficking in hazardous wastes.

The Eighth Conference of Parties, in 2006, requested the Secretariat to prepare a draft legal instruction manual on prosecuting illegal traffic based upon a draft outline already prepared by the Secretariat, and to maintain a collection of national legislation and other measures adopted by Parties to implement the Basel Convention, including measures to prevent and punish illegal traffic, and to make such measures available on the Convention website.³⁸⁰ In 2008, the Conference of Parties (Decision IX/23) invited Parties to provide the Secretariat with their comments on an existing draft detailed outline of the manual (UNEP/CHW/OEWG/6/12). Parties are also encouraged to submit to the Secretariat judgments of their respective courts dealing with illegal traffic, so it can publish them on the forthcoming case law section of this web site as an information tool for other Parties.

- ☛ The legal model provided by the Basel Convention demonstrates how the universalisation of enforcement jurisdiction against MLR crime might evolve over time. First, the illegal activity is defined and the treaty parties commit to prevent and punish offenders. Second, the gravity of the illegality is categorised as being criminal at a serious level and technical assistance is made available to develop model criminal laws to prevent the activity and punish offenders. Third, a register of national criminal legislation and related enforcement measures is assembled and maintained on a shared database so as to promote transparency, efficacy and cooperation.

Convention on International Trade in Endangered Species

The *Convention on International Trade in Endangered Species*³⁸¹ (CITES) requires parties to penalize trade that violates the Convention (art VIII). It does not specifically describe such violations as criminal or illegal.

Substantial work has been done to respond to transnational crime undermining the implementation of CITES.³⁸² The Secretariat, at the direction of the Conference of Parties, has adopted memoranda of understanding with the World Customs Organisation and with Interpol, providing for strengthened cooperation and increased exchange of information, joint publication of information materials to combat wildlife crime and joint training activities for enforcement officers. A report of the United Nations Secretary-General on the subject of the trafficking in protected species of flora and fauna submitted to the Commission on Crime Prevention and Criminal Justice at its 12th session, 13-22 May 2003 set out indicators for assessing the probability that organized criminal

³⁷⁸ *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, 1673 UNTS 126, (entered into force 5 May 1992). The present text of the Convention, with all current amendments and ratifications, came into full force on 8 October 2005. There are 53 signatories and 173 parties to the convention. A list of all parties with dates of accession can be found on the Convention website at <http://www.basel.int/ratification/convention.htm> (website: <http://www.basel.int/>).

³⁷⁹ Resolution VI/16 on Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes, <http://www.basel.int/legalmatters/illegaltraffic/index.html>.

³⁸⁰ Resolution IX/23 on Enforcement: national legislation and other measures adopted by Parties to implement the Basel Convention and to combat illegal traffic.

³⁸¹ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243, (entered into force 1 July 1975). There are currently 175 States Parties to the treaty. A list of all parties with dates of accession can be found on the Convention website at <http://www.cites.org/eng/disc/parties/index.shtml>.

³⁸² Some information has been gathered, however, which looks at the likely international trade in endangered species, as evidenced by the number of classified advertisements published on the internet for these species. See <http://www.cites.org/eng/news/world/19/7.shtml>.

groups were involved in that form of crime.³⁸³ The increased involvement of organized criminal groups in trafficking in protected species of wild flora and fauna was also noted in the Bangkok Declaration of the 11th United Nations Congress on Crime Prevention and Criminal Justice in 2005. A European Union study on the enforcement of the wildlife trade regulations among its members recommended the development of guidance on best practices for CITES enforcement as well as a common enforcement action plan and strengthened sanctions. Since CITES does not explicitly criminalise contraventions of its provisions per se, there are no statistics related to breaches of the Convention. The illegal trade in endangered marine species, such as certain turtles, or in their products, such as bones and eggs is lucrative. The illicit trade is facilitated by counterfeit documents, fraudulent applications for permits and false declarations to customs officials. South-east Asia alone is thought to be responsible for about a quarter of the world's illegal wildlife trade.

- ☛ CITES is not a suitable avenue by which a global legal framework to universally criminalise MLR crimes can be implemented. The main disadvantage of using CITES to universally criminalise CITES is that it would apply only to MLR already listed as endangered species under CITES. Most commercially managed fisheries are not listed. Furthermore, as CITES does not apply to actions other than illegal trade in endangered species, it cannot address such other harms to marine living resources as habitat destruction or destructive fishing practices.

Convention on Biological Diversity

The *Convention on Biological Diversity*³⁸⁴ has 3 main objectives: the conservation of biological diversity, the sustainable use of the components of biological diversity, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (art. 1). The treaty contains no criminal provisions concerning criminalisation at the national level and there is no data available concerning criminal incidences under it.

In 2010, the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* was adopted as a supplementary agreement to the *Convention on Biological Diversity*. It is yet to reach the 50 instruments of ratification required for it to enter into force. The Protocol will establish a global agreement for the fair and equitable sharing of the benefits arising from the utilization of genetic resources (art 1). During its negotiation, a group of technical and legal experts was established to report on compliance to the Ad Hoc Open-ended Working Group. The technical and legal experts suggested that, in relation to a breach of law concerning access and benefit sharing that occurs across jurisdictions, transnational law enforcement cooperation might be necessary. This could require proof of dual criminality in both countries and, therefore, the international regime might facilitate international enforcement cooperation (in ways compared to agreements such as the Convention against Transnational Organised Crime, UNESCO Convention on the Protection of the Underwater Cultural Heritage and UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, draft WHO Protocol on the Trafficking in Illicit Tobacco Products and Substances). The technical and legal experts also suggested that the international framework might expand on existing bilateral arrangements for cross-border enforcement and seek to harmonise due process of law standards, mutual recognition, basic remedies and time limits, as well as to list additional international measures such as criteria to guide courts in addressing compliance across jurisdictions. Although these suggestions provide an interesting template, they were not ultimately adopted.

On 29 January 2000, the Conference of the Parties to the *Convention on Biological Diversity* adopted the *Cartagena Protocol on Biosafety*.³⁸⁵ The Cartagena Protocol seeks to protect biological diversity from the potential risks posed by genetically modified organisms. The Cartagena Protocol establishes an advance informed agreement procedure for ensuring that States are provided with the information necessary to make informed decisions before agreeing to the import of such organisms into their territory. Parties are obliged to adopt measures to penalise illegal transboundary movement of living modified organisms (Article 25). The Cartagena Protocol does not prescribe criminal sanctions for breach of this or any other of its provisions. Nevertheless, it does establish a Biosafety Clearing-House to facilitate the exchange of information on living modified organisms and to assist States in the implementation of the Protocol.³⁸⁶ Although the Cartagena Protocol requires, albeit not in any detail, that Parties adopt sanctions, it does not deal with an area of significant MLR crime at this time.

- ☛ Among the CBD-related treaties, only the *Nagoya Protocol* addresses a significant MLR management issue in terms that relate to criminal acts. However, as it concerns a relatively narrow aspect of MLR management and has not yet entered into force and its negotiating parties rejected a criminal law model for its enforcement, the Nagoya Protocol is a fragile framework upon which to base the development of universalised MLR crime.

³⁸³ *Report of the Secretary-General on Illicit Trafficking in Protected Species of Wild Flora and Fauna* E/CN.15/2003/8, para. 29. UNODC CTOC 2008 Note 23.

³⁸⁴ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) There are 168 signatories and 193 parties to the Convention.

³⁸⁵ *Cartagena Protocol on Biosafety*, opened for signature 15 May 2000, 39 ILM 1027 (entered into force 11 September 2003). To date, 158 instruments of ratification or accession have been deposited.

³⁸⁶ See <http://www.cbd.int/biosafety/background.shtml>.

Crime Prevention Legal Framework

In contrast to the MEA regimes, global cooperative efforts to combat transnational crime have produced treaties that require their parties to proscribe specified acts as criminal. As yet, none of these require the proscription of specific acts of MLR harm. Organised crime, corruption and bribery are often incidental activities that facilitate MLR crimes. Multilateral crime prevention treaties requiring that their Parties act to prohibit and punish organised crime, corruption and bribery relate to transnational MLR crime, albeit indirectly.

The United Nations Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime (UNTOC), adopted in 2000, addresses both the harmonisation of certain criminal laws of its parties and the facilitation of law enforcement co-operation between those parties. It requires that its parties criminalise activities that are transnational in nature whenever they involve the following:

- Participation in an organised criminal group (art 5);
- Laundering of the proceeds of crime (art 6);
- Corruption (art 8); or
- Obstruction of justice (art 24).

These criminal activities might involve MLR crimes in some instances, such as where an illegal MLR activity is undertaken by an organised group, or when the proceeds of the illegal MLR activity are laundered, or where the MLR activity is facilitated by the corruption of public officials, or it involves obstruction of the administration of justice. Thus, these offences might pick up MLR crime only incidentally.

The CTOC also extends broadly to 'serious crime', if the offence is transnational and involves an organized criminal group (art 3). Serious crimes are offences that carry a maximum penalty of at least 4 years imprisonment (art 2). Although much MLR crime is transnational and undertaken by organised crime syndicates, it would seem to fall outside this provision, because it may not qualify as 'serious crime'.

In recent years, the Conference of Parties to CTOC has become more engaged on the specific topic of transnational environmental crime. In 2008, it decided to include transnational environmental crime as a form of emerging transnational crime in its work program for 2009. It noted that this form of crime did not receive attention at the time of the drafting of CTOC but that it can be embraced within it. Further discussion drew attention to the need for environmental crimes to be included within predicate offences to the crime of money laundering.³⁸⁷ In 2010, the fifth Conference of Parties identified environmental crime as one of five areas of emerging transnational crime.³⁸⁸

- ☛ There are signs of momentum gathering to address environmental crime under the CTOC. Naturally, this would relate to environmental crime that is transnational and organised, which would cover much MLR. There is no suggestion yet to commence any negotiations on a CTOC protocol on natural resources and environmental crime. However, formulation of a protocol suitable to combat MLR crime would appear to be conceptually straight forward. CTOC is the natural and most likely global framework for new legally binding commitments to universalise MLR crimes.

OECD Convention on Combating Bribery

Any enterprise involving exploitation of natural resources is usually subject to the issuance of a governmental permit. For example, permits are required to harvest seafoods in fishing grounds or to access samples of marine biological resources. Foreign fishing enterprises seeking to avoid landing or transshipment laws in the Port State may bribe port inspectors or customs officials in order to obtain the documentation necessary to sell their catch. Thus, public administration processes create opportunities for the corruption that is believed to be pervasive in the seafoods industry.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention)³⁸⁹ does not criminalise MLR crimes but has obvious relevance due to the presence of corruption in the international fishing industry.³⁹⁰

The Parties to the OECD Bribery Convention adopted an OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions on 9 December 2009, the 10th anniversary of the entry into force of the OECD Bribery Convention. This Recommendation sets out additional measures to prevent, detect and investigate foreign bribery. These include making companies liable despite the use of agents and intermediaries; the review of legitimate facilitation payments allowed to speed up administrative processes; improvements in mutual legal assistance in investigations, prosecutions and the

³⁸⁷ Decision 4/8 Reorganization of the work of the fifth session of the COP to CTOC, Report of the Conference of the Parties to CTOC on its 4th session, Vienna 8-17 October 2008, CTOC/COP/2008/19. http://www.unodc.org/documents/treaties/CTOC_COP_19_Report-edited_version.pdf

³⁸⁸ <http://www.unodc.org/unodc/en/wildlife-and-forest-crime/index.html>

³⁸⁹ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, opened for signature 17 December 1997, 37 ILM 1 (entered into force 15 February 1999). It currently has 38 parties. Although the OECD has only 30 members, non-members may ratify the Convention. http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html

³⁹⁰ Hanich Q. and Tsamenyi M.B, 'Managing Fisheries and Corruption in the Pacific Islands Region' (2009) 33(2) *Marine Policy* 386

recovery of proceeds; and improving channels for reporting suspected foreign bribery, including by protecting whistleblowers from retaliation.

- ☛ The OECD Bribery Convention offers very limited possibilities for universalising jurisdiction over MLR crimes. It applies already to corrupt transactions in the MLR sector. Even though widespread, these corrupt transactions are only those involving foreign countries that have ratified the OECD Convention, involving foreign public officials, and active bribery. Its limitations to international transactions with foreign countries mean that it does not encompass bribery which is entirely domestic or which does not involve a foreign country. Nor does it cover bribery of private business persons, or of persons holding influential political positions, such as political party officials, who are not members of government in legislative, administrative or judicial positions. Finally, it does not require that its parties criminalise the receiving or requesting of bribes.

The United Nations Convention on Corruption

The United Nations Convention on Corruption (UNCAC) was adopted by the United Nations General Assembly on 31 October 2003 and came into force on 14 December 2005.³⁹¹ Its Preamble refers to the connection between sustainable development and the fight against corruption, stating that the Parties have adopted the convention because they are:

Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law, ...

Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States, [and]

Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential... .

At its first session, the Conference of Parties to UNCAC acknowledged that the fight against corruption is an essential element to sustainable development.³⁹² However, the Conference of Parties has not yet addressed the nexus between corruption and natural resources crime. Article 62 of the UNCAC is the only one that mentions sustainable development specifically. It only addresses measures for implementation of the Convention through economic development and technical assistance and calls upon the Parties to take into account the negative effects of corruption on sustainable development, in particular, when taking measures to implement the Convention.

- ☛ The UNCAC applies primarily to domestic corruption without a transnational link required but does provide for international technical assistance and capacity building. It could provide a useful legal framework for capacity building in fishing ports for fisheries and customs inspectors in order to minimise corrupt facilitation of MLR crimes.

GLOBAL INSTITUTIONS

MLR crime has been on the agenda of some global institutions, but to varying degrees. International compliance capacity building activities, aimed at prevention of environmental crimes, are said to be intensifying at a rapid rate, perhaps even threatening congestion by overlapping agendas.³⁹³ The following survey of global institutions active in the field of marine governance, environmental management and criminal justice is intended to indicate which agencies may be likely to carry forward an agenda for universalising jurisdiction to enforce against MLR crimes.

The means available to global bodies to promote the universalisation of MLR crimes include the commissioning a feasibility studies, establishment of expert working groups to explore the issues and make recommendations, formulation of guidelines and action plans, adoption of resolutions urging cooperative action, and declarations of principles or norms, etc. As noted in Chapter 10 on transnational law enforcement cooperation, practical mechanisms available to coordinate the work of national criminal law enforcement institutions include information and intelligence exchange, mutual legal assistance, extradition, technical assistance and capacity building, asset seizure and sharing, and complaints investigation and integrity monitoring.

³⁹¹ It currently has 140 signatories and 143 parties. <http://www.unodc.org/unodc/en/treaties/CAC/index.html>

³⁹² Resolution 1/6 International cooperation workshop on technical assistance for the implementation of the United Nations Convention against Corruption

³⁹³ Lorraine Elliott 'Transnational Environmental Crime in the Asia Pacific: An Un(Der)-Securitised Security Problem?' (2007) 20(4) *The Pacific Review* 499–522.

General Mandate Institutions

The United Nations General Assembly

The United Nations General Assembly (UNGA) provided the mandate for the negotiation of the UN Convention on the Law of the Sea, its 1994 Implementing Agreement, and its 1995 UN Fish Stocks Agreement supplementary to the LOSC. In 1989, UNGA adopted the first of a succession of almost annual recommendations until the year 2002 on Large Scale Driftnet Fishing.³⁹⁴ In 2003, these recommendations were replaced by a broader annual recommendation on sustainable fisheries. The annual sustainable fisheries recommendations address problems in implementation of the 1995 UN Fish Stocks Agreement and broader fisheries conservation and management issues in such areas as: conservation of marine biodiversity; illegal, unregulated and unreported fishing; fisheries monitoring, control and surveillance; by-catch; and compliance and enforcement.³⁹⁵

The UNGA is also the body to which the UN Secretary General reports annually on the situation and progress on ocean affairs and law of the sea. Since 1993, UNGA has adopted an annual resolution on oceans and law of the sea that highlights problematic issues and instructs the Secretary-General on priority work for the coming calendar year.³⁹⁶ Finally, it should be noted that in the year 2000 UNGA also resolved that the CTOC 'constitutes an effective tool and the necessary legal framework for international cooperation in combating such criminal activities as illicit trafficking of protected species of wild flora and fauna...'.³⁹⁷ In 2012, the most recent in a series of resolutions adopted by the UNGA expressed concern about environmental crime, including trafficking in endangered and protected species of wild fauna and flora.³⁹⁸

- UNGA could mandate that the UN Secretary-General prepare a report on the threats posed by MLR crime and opportunities to combat it. Ultimately, the objective might be to mandate negotiations of a further protocol to the LOSC or to the UN Fish Stocks Agreement to address MLR crime. An avenue through which this might be brought to the attention of the UNGA is the UNICOPOL process, discussed below.

The Economic and Social Council

The Economic and Social Council (ECOSOC) is an organ of the United Nations established under the United Nations Charter that coordinates the economic, social and related work of UN bodies, including specialized agencies, functional commissions and regional commissions. ECOSOC does this by formulating policy recommendations and initiating studies and reports on issues related to this work and by directing the preparations and organization of major international conferences and follow-up to these conferences in the economic, social and related fields. Among the functional commissions relevant to MLR crime that ECOSOC coordinates is the Commission on Crime Prevention and Criminal Justice (CCPCJ), also discussed below.

In ECOSOC Resolution 2001/12, it first urged its members to adopt 'legislative or other measures necessary for establishing illicit trafficking in protected species of wild fauna and flora as a criminal offence in their domestic legislation'. In Resolution 2003/27, ECOSOC called on its members to 'review their criminal legislation with a view to ensuring that offences relating to trafficking in protected species of wild flora and fauna are punishable by appropriate penalties that take into account the serious nature of those offences' and to undertake mutual legal assistance agreements to promote international law enforcement cooperative measures.³⁹⁹ In 2010, ECOSOC decided that the prominent theme for the 22nd session of the UN Congress on the Prevention of Crime and the Treatment of Offenders (CPC) would be on environmental crime.⁴⁰⁰ In 2011, ECOSOC requested that its members 'consider making illicit trafficking in endangered species of wild fauna and flora a serious crime, in accordance with their national legislation and article 2, paragraph (b), of the United Nations Convention against Transnational Organized Crime'.⁴⁰¹ In 2012, ECOSOC recognised the links between transnational organised crime and environment.⁴⁰² ECOSOC Resolution 2012/19, among other things, recognised that "transnational organized crime has diversified and represents a threat to health and safety, security, good

³⁹⁴ Commencing with *Large-Scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas*, GA Res 44/225, UN GAOR, 85th plen mtg, UN Doc A/RES/54/254 (22 December 1991).

³⁹⁵ Most recently, see *Sustainable Fisheries, Including Through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and High Migratory Fish Stocks, and Related Instruments*, GA Res 67/79, UN GAOR, 67th sess, Agenda Item 75(b), UN Doc A/RES/67/79 (11 December 2012).

³⁹⁶ UN Division for Ocean Affairs and Law of the Sea: UNGA Resolutions and Decisions on Oceans and Law of the Sea http://www.un.org/depts/los/general_assembly/general_assembly_resolutions.htm

³⁹⁷ *United Nations Convention Against Transnational Organized Crime*, opened for signature 15 November 2000, 40 ILM 335 (entered into force 29 September 2003).

³⁹⁸ *Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in Particular its Technical Cooperation Capacity*, GA Res 67/189, UN GAOR, 67th sess, Agenda item 103, UN Doc A/RES/67/189 (20 December 2012).

³⁹⁹ *International Cooperation in the Prevention, Combating and Elimination of Kidnapping and in Providing Assistance to Victims*, ESC Res 2003/27, 44th mtg, UN Doc E/RES/2003/27.

⁴⁰⁰ *Report of the Commission on Crime Prevention and Criminal Justice on its Nineteenth Session and Provisional Agenda and Documentation for its Twentieth Session*, ESC Res 2010/243, 45th plen mtg, UN Doc E/RES/2003/27.

⁴⁰¹ *Crime Prevention and Criminal Justice Responses Against Illicit Trafficking in Endangered Species of Wild Fauna and Flora*, ECS Res 2011/36, UN Doc E/RES/2011/36.

⁴⁰² *Strengthening International Cooperation in Combating Transnational Organized Crime in all its Forms and Manifestations*, ECS Res 2012/19, Agenda item 14(c), E/RES/2012/9.

governance and the sustainable development of States”, and emphasised that “all States have a shared responsibility to take steps to counter transnational organized crime, including through international cooperation and in cooperation with relevant entities such as the United Nations Office on Drugs and Crime.”

The ECOSOC is a suitable forum within which to raise the profile of discussion and dialogue concerning MLR crimes. It has the capacity to establish subsidiary bodies for the discussion and formulation of international policy relating to MLR crimes, and has in the past formulated resolutions for the establishment of United Nations programs to combat crime and environmental degradation.

- ☛ ECOSOC has an institutional interest in environmental crime but it does not have the institutional ability to build national capacities in this area, nor does it have authority to mandate negotiations for new legal agreements. It is, therefore, not of primary importance in promoting the universalization of enforcement jurisdiction over MLR crimes.

Marine Institutions

The United Nations Open-Ended Informal Consultative Process

The United Nations Open-Ended Informal Consultative Process on Oceans and Law of the Sea (UNICPOLOS) was established in 1999 by the United Nations General Assembly.⁴⁰³ UNICPOLOS facilitates dialogue across different UN institutions engaged in oceans and law of the sea policy formulation processes and therefore has a unique function in enabling them to coordinate their respective positions and initiatives. As an open-ended informal process, non-governmental organisations are also invited to participate fully.

UNICPOLOS meets for one week annually in June in New York, having met for the 14th time in 2013. Its role is to consider the annual report by the UN Secretary General on oceans and law of the sea and, then, to suggest particular areas to be reported on in it and areas where coordination and cooperation of the intergovernmental and interagency levels should be enhanced.⁴⁰⁴ Each year, UNICPOLOS adopts a list of issues that could benefit from the attention of the General Assembly in its future work on oceans and law of the sea. The theme of the 14th meeting was on ‘impacts of ocean acidification on the marine environment’. The theme of the 15th meeting, in 2014, will be potential and new uses of the oceans. To promote United Nations attention to marine living resources crimes, it could be helpful to raise this issue for discussion at a meeting of the UNICPOLOS.

- ☛ Could a future UNICPOLOS theme be devoted to MLR crime? This would be a major step forward to secure the attention of the General Assembly and the UNSG. Priority for this area on the UNICPOLOS agenda might be more accessible if presented as a facet of the broader area of maritime crime. A crime against MLR could then be highlighted in panel presentations.

Food and Agriculture Organisation of the United Nations

The Food and Agriculture Organisation is an intergovernmental organisation established under its own charter during the incumbency of the League of Nations and is now as a specialised agency of the United Nations. It has 194 member States, two associate members and one member organisation (namely, the European Union). The FAO aims to eliminate hunger, food insecurity and malnutrition globally and it promotes its aims mostly by collecting and disseminating data, providing policy advice to member countries, providing a forum for members to meet and sending them technical expertise. Serviced by its Fisheries and Aquaculture Department, which aims ‘to strengthen global governance and the management and technical capacities of members and to lead consensus-building towards improved conservation and utilization of aquatic resources’,⁴⁰⁵ the FAO’s Committee on Fisheries (COFI) is a major force in the formulation of global policy concerning MLR.

Concerning IUU fishing, the FAO has adopted, through COFI, the PSM-IUU Agreement, Compliance Agreement, and Model Scheme on Port State Measures. It has also adopted a Code of Conduct on Responsible Fishing as well as many supporting Technical Guidelines on Responsible Fishing, and International Plans of Action on IUU, Capacity, Seabirds, and Sharks. None of these instruments mandate criminal sanctions for illegal fishing. The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing advocates simply for an administrative penalty scheme to deprive offenders of the benefits of IUU fishing, without specifically advocating any criminal sanctions.⁴⁰⁶ The record indicates that some FAO members do not tend to regard criminal sanctions as a necessary to prevent and deter IUU fishing, preferring economic sanctions such as denial of port access.⁴⁰⁷ This reluctance may be due to the sensitivity to crime in the area of marine living resources crime for those countries whose nationals are known to organise illegal fishing activities.

⁴⁰³ UNODC, *Transnational Organised Crime in the Fishing Industry* (2011).

⁴⁰⁴ UN Division for Ocean Affairs and Law of the Sea: UNICPOLOS <http://www.un.org/depts/los/consultative_process/consultative_process.htm>

⁴⁰⁵ FAO, *Vision and Mission* <<http://www.fao.org/fishery/about/en>>

⁴⁰⁶ E.g. International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, FAO, 2001) <<http://www.fao.org/docrep/003/y1224e/y1224e00.htm>>

⁴⁰⁷ E.g. Report of the FAO Regional Workshop on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, *FAO Fisheries Report No. 859*, Cape Town, South Africa, 28–31 January 2008, para. 36.

- ☛ The FAO is an unlikely global institution through which universalised criminalisation of MLR crimes can be pursued. Although its outputs recognise the relevance of sanctions for MLR illegal fishing, FAO is institutionally reticent to oblige criminal sanctions.

Environmental Institutions

The United Nations Environment Programme

The United Nations Environment Programme (UNEP) organized a UNEP Workshop on Enforcement of and Compliance with MEAs focused on environmental crime in 1999.⁴⁰⁸ Subsequently, UNEP adopted *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements*.⁴⁰⁹ Those Guidelines comprise two parts. The first deals with enhancing international compliance with multilateral environmental agreements and the second with national enforcement and international cooperation in combating violations of domestic laws implementing multilateral environmental agreements. Part II of the Guidelines for National Enforcement goes on to make special provisions for international cooperation and coordination to promote and assist in national enforcement. National enforcement methods include the use of criminal provisions, prosecutions and sanctions for breaches of national standards implementing multilateral environment agreements.⁴¹⁰ The *UNEP Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* also addresses environmental crime and provides case studies of administrative, civil and criminal penalties.⁴¹¹

UNEP's existing initiatives in relation to compliance with multilateral environment agreements engage it in a practical effort to improve enforcement of national laws through the prosecution of environmental crimes. These initiatives addressing enforcement include capacity building for judges and prosecutors to combat environmental crime.⁴¹²

UNEP's Regional Office for Asia and the Pacific is the host and Secretariat for the Asian Regional Partners Forum on Combating Environmental Crime (ARPEC). ARPEC members meet biannually and, in 2011, the 11th meeting initiated ARPEC attention to issues of illegal fishing.⁴¹³ In November 2013, UNEP will hold a Joint Conference with INTERPOL on international environmental compliance and enforcement. Immediately related to the problem of MLR crime, UNEP will host at its headquarters in Nairobi INTERPOL's 2nd Fisheries Crime Working Group Meeting, which will be held in conjunction with the November compliance and enforcement conference.

UNEP is not institutionally engaged in law enforcement issues for fisheries management and conservation but is deeply involved in these issues for biodiversity conservation. Legal frameworks and national capacity building to combat MLR crime are within UNEP's mandate. A focus on combating MLR crime would complement UNEP's existing capacity building work on environmental law enforcement.

- ☛ UNEP would be an appropriate platform to carry forward an initiative to universalise jurisdiction to combat MLR crime but in partnership with other international organisations deeply engaged in MLR conservation and management, particularly the FAO, as it is with INTERPOL.

Criminal Justice Institutions

The United Nations Office on Drugs and Crime

The United Nations Office on Drugs and Crime (UNODC) was formed in 1997 through a merger between the Drug Control Programme and the Centre for International Crime Prevention.⁴¹⁴ UNODC's work is focused on combating illicit drugs, crime and terrorism through technical assistance projects to build the law enforcement capacity of countries; research and analytical work to increase knowledge and understanding of drugs and crime issues; and the development of domestic legislation to enable States implement the relevant international treaties. UNODC is based in Vienna and serves as Secretariat to treaty-based conferences of parties and to related policy bodies such the Commission on Crime Prevention and Criminal Justice (CCPCJ) and the UN Congress on the Prevention of Crime and the Treatment of Offenders (CPCP) (see below).

UNODC's interest in transnational environmental crime has grown dramatically in recent years. Acting as Secretariat to the Conference of Parties to CTOC, UNODC presented a Note by the Secretariat in October 2008 to the CTOC Conference of Parties on 'Criminalization within the Scope of the United Nations Convention against Transnational Organized Crime and the Protocols

⁴⁰⁸ Report of the Workshop on Enforcement of and Compliance with Multilateral Environmental Agreements (MEAs) UNEP/Env.Law/MEAs.RPT (30 Jul 1999).

⁴⁰⁹ Decision SS.VII/4 of a Seventh Special Session of its Governing Council/Global Ministerial Forum on 15 February 2002.

⁴¹⁰ UNEP Division of Environmental Law and Conventions, *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements* <<http://www.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf>>

⁴¹¹ UNEP Division of Environmental Law and Conventions, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* <http://www.unep.org/delc/portals/119/UNEP_Manual.pdf>

⁴¹² UNEP Division of Environmental Law and Conventions (DELIC) Judges Programme <<http://www.unep.org/delc/judgesprogramme/tabid/78617/Default.aspx>>

⁴¹³ UNODC, *Sharing Intelligence Key to Fighting Environment Crimes* <<http://www.unodc.org/eastasiaandpacific/en/2011/07/arpec/story.html>>

⁴¹⁴ UNODC <<http://www.unodc.org/unodc/index.html>>

thereto'. Under the heading of its activities in relation to 'emerging crime', the Note set out UNODC's work in recent years examining the involvement of organized criminal groups in different forms of environmental crime.⁴¹⁵

The immediate past Executive Director of UNODC, **Antonio Maria Costa**, in his UNODC blog 'Costa's Corner' posted an item on 15 October 2008 entitled 'Raping the Planet'.⁴¹⁶ He noted that

Since environmental crimes defy borders there must be laws to match. Just as there are international laws against the trafficking of people, weapons and drugs, it is time to take global action against the illicit trade in natural resources. ... But there is no comprehensive legal framework to prevent the trafficking of timber from illegal logging. ... How can the existing legal framework, like the United Nations Convention against Transnational Organized Crime, be applied more effectively to deal with environmental crime? Do we need a special (Fourth) Protocol? Something must be done to set clear and common international standards and create universal measures, subject to peer review, to fight environmental crime, to deter businesses and individuals involved in these trades, and strengthen the capacity of states to work across borders to catch environmental offenders.

Since then, UNODC has established a programme on environmental crime that focuses on forest and wildlife offences with much of its work regionally focused on Africa and South East Asia.⁴¹⁷ The African work programme is focused on wildlife trafficking, particularly for ivory and rhinoceros horn, largely in Eastern Africa⁴¹⁸ but seems relatively weak.

The South East Asia programme, coordinated through the UNODC regional office for Asia in Bangkok is a more active and better resourced endeavour. It seeks to suppress crimes of illicit trafficking in natural resources and hazardous substances by building the capacity of vulnerable States to implement environmental governance. This aim is being promoted through regional policies and strategies to suppress trafficking and corruption, promotion of international law enforcement cooperation, training for law enforcement officials, and engagement of manufacturers and consumers to reduce market demand for illicit natural resources and hazardous substances.⁴¹⁹ Almost half of UNODC's 2013 report on transnational organised crime in East Asia and the Pacific addressed environmental crime.⁴²⁰

In 2010, UNODC launched a project to fight illegal logging in Indonesia⁴²¹ which forms the central point of its regional activities. Another UNODC project launched in 2010 is the Partnership Against Transnational-crime through Regional Organized Law-enforcement (PATROL). PATROL aims to improve international law enforcement cooperation in Indo-China against transnational crime, including environmental crime. In 2012, UNODC published a *Wildlife and Forest Crime Analytic Toolkit*.⁴²²

The UNODC has also embarked on a research and publication effort relevant to MLR crime. In 2011, it published a report on transnational organized crime and other criminal activity in the fishing industry, which touched on environmental crime⁴²³ and in 2013 UNODC published an issue paper on *Combating Transnational Organized Crime Committed at Sea*⁴²⁴ that includes a chapter on fisheries crime. It seems clear that environmental crime is regarded as an area of emerging crime that UNODC will become increasingly engaged in, both by virtue of its own mandate and by reason of its Secretariat role to bodies such as the CCPCJ (see below) and the Conference of Parties to the CTOC.

- Among UN organisations currently engaged in combating environmental and MLR crimes, UNODC is the most active. Its work includes research and publication, assembling relevant expertise through conferences and partnership projects, building capacity through training and information toolkits, and through fostering international cooperation. UNODC is likely to be most able to take forward an initiative to universalise jurisdiction to combat MLR crime. However, it is not a political body and will not mandate political actions such as the drafting of guidelines or commencement of treaty negotiations. Its role would be to conduct research and publication and to organise a workshop on the subject.

⁴¹⁵ UNODC, Note by the Secretariat: Item 2 (b) of the provisional agenda: Review of the implementation of the UN CTOC and the Protocols thereto. United Nations CTOC/COP/2008/4: 4th Session Vienna, 8-17 October 2008. <<http://www.unodc.org/documents/treaties/COP2008/CTOC%20COP%202008%204%20final%20E.pdf>>

⁴¹⁶ Costa, M. <<http://www.unodc.org/unodc/en/about-unodc/costas-corner/raping-the-planet.html>>

⁴¹⁷ UNODC, *Environmental Crime: Trafficking in Wildlife and Timber* <<http://www.unodc.org/toc/en/crimes/environmental-crime.html>>

⁴¹⁸ UNODC, *Eastern Africa: UNODC to Address Rising Environmental Crime* <<http://www.unodc.org/unodc/en/frontpage/2009/November/eastern-africa-unodc-to-address-rising-environmental-crime.html>>

⁴¹⁹ UNODC, *Natural Resources and Hazardous Substances* <<http://www.unodc.org/southeastasiaandpacific/en/topics/illicit-trafficking/environmental-crimes.html>>

⁴²⁰ UNODC *Transnational Organised Crime in East Asia and the Pacific: A Threat Assessment 2013*, including chapters on illicit trafficking in ozone-depleting substances, illegal wood products, electronic waste, and illegal wildlife <http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf>

⁴²¹ UNODC, *UNODC Gears Up to Support the Fight Against Forest Crimes in Indonesia* <<https://www.unodc.org/indonesia/2010/07/illegal-logging/story.html>>

⁴²² UNODC *Wildlife and Forest Crime Analytic Toolkit* <<http://www.unodc.org/unodc/en/wildlife-and-forest-crime/joint-initiatives.html>>.

⁴²³ UNODC, *Transnational Organised Crime in the Fishing Industry* (2011).

⁴²⁴ See UNODC, *Combating Transnational Organized Crime Committed at Sea* <www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf>

The United Nations Interregional Crime and Justice Research Institute

The United Nations Interregional Crime and Justice Research Institute (UNICRI)⁴²⁵ was established in 1968 to undertake applied research in the formulation and implementation of improved policies in the field of crime prevention and criminal justice. UNICRI's Applied Research Programme comprises four themes: Emerging Crimes and Anti-Human Trafficking; Security Governance and Counter Terrorism Laboratory; Justice Reform and Post-Graduate Training (training of specialized personnel forms an integral part of UNICRI activities). The notion of Emerging Crimes is conceptually broad enough to encompass environmental crime.

UNICRI's research work on environmental crime was initiated in 1994. It conducted work on the topic of "Environmental protection at the national and international levels: potentials and limits of criminal justice", following the workshop held on that topic at the Ninth Congress in 1995. After 1995, work on this topic went into hiatus until 2009, when UNICRI published research on 'Eco-crime and Justice Essays on Environmental Crime'.⁴²⁶ UNICRI's projects are targeted to regions and countries that are more in need of support in the field of crime prevention and criminal justice and they tend to holistically tackle legislative, enforcement and social aspects, and may provide services such as documentation, research and training.

- ☛ Although UNICRI has no mandate to develop legal norms but functions only as a research institute or think tank, it could provide a useful forum for developing significant research and knowledge concerning global MLR crime. It might also consider aspects of the universalisation of national prescriptive and enforcement jurisdiction against it in its future work.

United Nations Congress on the Prevention of Crime and the Treatment of Offenders

A United Nations Congress on the Prevention of Crime and the Treatment of Offenders (CPC) is held every five years. The first was held in 1955 and the next, the 13th, will be held in 2015. Each Congress assembles experts on criminal justice systems and of government representatives from United Nations members and includes a high-level segment, round tables and workshops. The Congress serves as a guiding body for the work of the CCPCJ. Regional preparatory meetings are also held. Each Congress adopts a declaration containing recommendations submitted back to the following CCPCJ.⁴²⁷

The Eighth Congress, held in 1990, initiated the Congress's engagement with environmental crime.⁴²⁸ In the lead up to the United Nations Conference on Environment and Development in Rio in 1992, CPC adopted a resolution on the role of criminal law in the protection of nature and the environment. It dealt with the general theme of environmental crime more fully at the Ninth Congress, in 1995 which requested that the CCPCJ place special emphasis on the development of strategies for the effective prevention and control of transnational and organized crime and on the role of criminal law in the protection of the environment.⁴²⁹ The CCP became engaged engagement with the notion of environmental crime in the lead up to UNCED in 1992 was at a broad theoretical level and dissipated altogether after 1995.

- ☛ To reinforce the work of the UNODC on MLR crime it might be possible for CPC to pick up this issue in 2015 as part of its mandate to set the agenda for international cooperative projects for the progressive development of criminal justice.

The Commission on Crime Prevention and Criminal Justice

The Commission on Crime Prevention and Criminal Justice (CCPCJ) is a subsidiary body of the ECOSOC.⁴³⁰ It was established by resolution of the UNGA in 1992 following the recommendation of the Eighth CPC, a related ministerial meeting held in Versailles in 1991, and ECOSOC recommendation 1992/1. CCCPCJ succeeded a more technically focussed Committee on Crime Prevention and Control. The CCPCJ guides the work of UNODC and provides a forum for its member States to formulate common policies and collaborative work programs. The members of CCCPCJ comprise 40 government representatives and it meets in annual sessions that are staggered through each year. CCCPCJ is based in Vienna and the UNODC provides it with Secretariat services.

The CCPCJ's four mandated priorities, set out below, now include combating environmental crime:

1. International action to combat national and transnational crime, including organized crime, economic crime and money laundering;
2. Promoting the role of criminal law in protecting the environment;
3. Crime prevention in urban areas, including juvenile crime and violence; and
4. Improving the efficiency and fairness of criminal justice administration systems.⁴³¹

⁴²⁵ UNICRI < <http://www.unicri.it/> >

⁴²⁶ K Kangaspunta & I H Marshall (ed.s), *Eco-crime and Justice: Essays on Environmental Crime* (UNICRI, 2009)

⁴²⁷ UNODC, *United Nations Crime Congress* <<http://www.unodc.org/unodc/en/crime-congress/crime-congresses.html>>

⁴²⁸ 8 Congress Report A/CONF.144/28/Rev.1, Havana 27 Aug - 7 Sep 1990, [285 pp]

<http://www.asc41.com/8th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/8th_congress.htm>

⁴²⁹ A/CONF.169/16, Cairo, Egypt, 29 April – 8 May 1995 [121 page doc] Report, para. 15.

⁴³⁰ UNODC, *The Commission on Crime Prevention and Criminal Justice* <<http://www.unodc.org/unodc/en/commissions/CCPCJ/index.html>>

⁴³¹ *Implementation of General Assembly resolution 46/152 concerning operational activities and coordination in the field of crime prevention and criminal justice*, ESC Res 1992/22, Supp No 10, UN Doc E/RES/1992/22.

Although promoting the role of criminal law in protecting the environment was one of the four mandated areas of work of the Commission on Crime Prevention and Criminal Justice upon its establishment in 1992, it was not engaged in this area for its first dozen years. In 2005, in the context of combating transnational crime, CCPCJ noted that trafficking in protected species of wild flora and fauna posed a significant threat to protection of the environment and the involvement of transnational organised criminal groups in those activities.⁴³²

In 2007, at its 16th Session, CCPCJ became engaged in a specific and substantive way with the effort to combat transnational environmental crime. Resolution 16/1, on “International cooperation in preventing and combating illicit international trafficking in forest products, including timber, wildlife and other forest biological resources”, was adopted by the Commission.⁴³³ This Resolution expressed concern over the adverse environmental, social and economic impacts of such trafficking in illegally harvested forest products, noted that it was often perpetrated by organised criminal groups that operate transnationally and might also be engaged in other illicit activities, and urged the use of international cooperation and mutual legal assistance to help prevent, combat and eradicate such trafficking.

In response to the reports of the Open-Ended Working Group and of the Secretariat, CCPCJ, at its 18th session, held in 2009, recommended that ECOSOC adopt a decision noting that the CCPCJ proposes to have as the theme for its 21st session “New and emerging forms of transnational organized crime, including environmental crime”.⁴³⁴ Ultimately, this thematic discussion was postponed to the 22nd session. Discussion at the 18th session welcomed the growing attention being paid to crimes against the environment, noting its emergence as a form of transnational organised crime, and stressed the importance of criminalizing trafficking in plants or products traded in violation of the law. [para. 88]

At the CCPCJ 22nd session, 22-26 April 2013, the thematic discussion took place on emerging environmental crime (Agenda item 4). The Secretariat produced a discussion guide⁴³⁵ and the discussion addressed challenges posed by forms of crime that have a significant impact on the environment and possible responses, programs and initiatives to deal effectively with them. Non-governmental environmental organisations actively participated in the issues, hosting information displays and discussion forums. Side events on environmental crime included panels on transnational organised fisheries crime and the universalisation of jurisdiction against MLR crime.⁴³⁶ The CCPCJ session considered a draft resolution for ECOSOC on criminal justice responses to trafficking in protected species of wild flora and fauna⁴³⁷ and adopted a resolution on combating transnational organised crime committed at sea.⁴³⁸ The Secretariat produced a report on transnational organised crime committed at sea, following on from an international expert workshop convened on this topic,⁴³⁹ and CCPCJ adopted a resolution calling for UNODC to continue its work in this area, in accordance with the recommendations in the report, and to reconvene the international expert workshop.⁴⁴⁰

- ☛ CCPCJ is the primary United Nations system decision-making body forming policy in the area of environmental crime. The work that it has undertaken since 2007 has been highly focused on illegal trafficking in wildlife and forest products. This work is likely to be expanded in the future to address fishing crimes. CCPCJ is, therefore, a most important vehicle for progressing the notion of universalised MLR crime within the United Nations system.

INTERPOL

INTERPOL was established in 1923 to facilitate cross-border police co-operation. It is a global organization, with 188 member countries although not part of the United Nations system of organizations. It is based in Lyon, France.⁴⁴¹ Environmental crime is not one of the organization's six priority areas. The Environmental Crime Programme itself has a small staff but is growing rapidly due to external secondments and funding.

The INTERPOL Environmental Crime Programme's work was guided by an Environmental Crime Committee that was established in 1992 and which held a biennial conference that serves as a forum for environmental crime enforcement information exchange concerning emerging trends, new strategies and practices, expertise and international co-operation. In March 2012, an

⁴³² *Report of the Commission on Crime Prevention and Criminal Justice on its Fourteenth Session*, 14th sess, UN Doc E/2005/30, E/CN.15/2005/20 (23-27 May 2005) [75 page doc] [para.s 94-96]

⁴³³ *Consolidated Report of the Commission on Crime Prevention and Criminal Justice on its Regular and Reconvened Sixteenth Session*, 16th Sess, UN Doc E/2007/30/Rev.1, E/CN.15/2007/17/Rev.1, (28 April 2006 and 23-27 April 2007 and 29-30 November 2007) [120 page doc] [para. 24]

⁴³⁴ *Report of the Commission on Crime Prevention and Criminal Justice on its 18th Session*, 18th sess, UN Doc E/2009/30, E/CN.15/2009/20 (18 April 2008 and 16-24 April 2009) [75 page doc]

⁴³⁵ UNODC, *Discussion Guide for the Thematic Discussion on the Challenge Posed by Emerging Forms of Crime that have a Significant Impact on the Environment and Ways to Deal with it Effectively*, UN Doc E/CN.15/2013/2 (12 February 2103)

⁴³⁶ The interim report for this research project was delivered as a side panel event in April 2013.

⁴³⁷ UNODC E/CN.15/2013/L/20, 2 April 2103 (draft submitted by Peru and USA) and adopted as E/CN.15/2013/27, Chap 1.B *Draft Resolutions to be adopted by ECOSOC*, Draft Resolution IV, p. 36.

⁴³⁸ UNODC E/CN.15/2013/L/17, 2 April 2103 (draft submitted by Norway) and adopted as E/CN.15/2013/27, Chap 1.D *Matters Brought to the Attention of ECOSOC*, Resolution 22/6 ‘Promoting international cooperation and strengthening capacity to combat the problem of transnational organized crime committed at sea’, p.59.

⁴³⁹ Report of the Executive Director, *Combating the Problem of Transnational Organized Crime Committed at Sea*, UN DOC E/CN.15/2013/17.

⁴⁴⁰ Chap 1.D *Matters Brought to the Attention of ECOSOC*, Resolution 22/6 ‘Promoting international cooperation and strengthening capacity to combat the problem of transnational organized crime committed at sea’, p 59 para. 11 UNODC E/CN.15/2013/27

⁴⁴¹ <<http://www.interpol.int/>>

INTERPOL/UNEP 'International Chiefs of Environmental Compliance and Enforcement Summit' decided to restructure and rename the committee as the Environmental Compliance and Enforcement Committee. The new committee will hold its first meeting in November 2013. The Environmental Compliance and Enforcement Committee is supported by three open ended working groups which each meet annually. The three working groups are on Wildlife Crime, on Pollution Crime, and on Fishing Crime.

In relation to Wildlife Crime, the working group's focus is on poaching of tigers, elephant tusk and rhinoceros horn and on illegal logging. Project Predator addresses tiger poaching; Project Wisdom addresses elephant poaching; and Project Leaf addresses illegal logging. INTERPOL activities in these areas have included establishing an international wildlife forensics database, publishing procedures manuals, handbooks and best practice guides, training exercises and joint operations leading to the arrests of wildlife poachers and traffickers.⁴⁴²

In relation to Pollution Crime, INTERPOL's focus was originally on the marine environment. The CLEAN SEA project on maritime pollution seeks to combat illegal oil discharges from ships and has compiled an Investigative Manual on Illegal Oil Discharges from Vessels and a training course delivered through workshops. The Pollution Crime area of work has expanded to include reports, manuals and training on climate change and corruption, organized criminal involvement in electronic waste disposal, and environmental crime forensics. The latter involves training courses for the investigation and prosecution of significant environmental crimes.⁴⁴³

The Fishing Crime Working Group was established in February 2013, preceded in 2012 by meetings of an Ad Hoc Fisheries Crime Working Group on the establishment of a permanent fisheries crime working group. It aims to promote capacity building, information exchange and operational support to suppress fisheries crime. Project Scale provides a strategic plan for INTERPOL's role in addressing connections with crossover crimes, information and intelligence exchange, facilitation of networks between members, and provision of analytical and operational support.

In 2012, Interpol initiated a concerted effort to encourage each of its 190 member countries to form a National Environmental Security Task Force (NEST). The idea is that each NEST will bring together environmental compliance and enforcement agencies to form environmental units that cooperate across government sectors of administration. The NESTS are promoted in particular through regional conferences and National Environmental Security Seminars.

In addition, INTERPOL provides support in law enforcement operations across its wildlife, pollution and fisheries project areas,⁴⁴⁴ and produces manuals and broader spectrum information products and electronic channels for data sharing. INTERPOL's Environmental Law Programme has pioneered a system, called Ecomessage, to provide a uniform format for the exchange of criminal intelligence and construction of a database for intelligence on environmental crime.⁴⁴⁵

INTERPOL's role in facilitating cross-border police cooperation is essentially one of coordination but the role is dynamic and is being developed to include the building of national law enforcement capacity. This fluid approach also allows for some conceptual developmental work, as evidenced in its reports on emerging areas of crime, such as its assessment of the links between organised crime and electronic waste and its *Guide to Carbon Trading Crime*.⁴⁴⁶

- INTERPOL is rapidly expanding its Environmental Crime Programme. As fisheries crime is a major component of environmental crime and intimately related to most facets of MLR crime, many opportunities to promote the universalisation of jurisdiction over MLR crime are available through the new Fisheries Crime Working Group. Further connection with broader MLR could be managed by a link between the Wildlife Crime and the Fisheries Working Group. An INTERPOL report on the contemporary problems of international legal gaps in national enforcement jurisdiction over fisheries or MLR crime, that canvasses solutions including the universalisation of enforcement jurisdiction, could be produced for consideration by the Fisheries Crime Working Group.

The World Customs Organisation

The World Customs Organisation (WCO) works with international and national environmental governance bodies to promote the implementation of trade-related obligations in multilateral environmental agreements. The environmentally-sensitive commodities of concern are those covered by agreements with trade-related provisions, namely: Basel, Cartagena, CITES, Montreal, Rotterdam and Stockholm Conventions.

WCO is in the process of establishing customs codes under the Harmonized Commodity Description and Coding System for chemicals restricted in international trade, such as those listed under the Rotterdam and Stockholm Conventions, and for key categories of hazardous waste, such as electronics waste, so as to facilitate their identification at customs borders.

⁴⁴² INTERPOL, *Projects* <<http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-Predator>>

⁴⁴³ INTERPOL, *Environmental Compliance and Enforcement Committee* <<http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-Compliance-and-Enforcement-Committee/Pollution-Crime-Working-Group>>

⁴⁴⁴ INTERPOL, *Operations* <<http://www.interpol.int/Crime-areas/Environmental-crime/Operational-support>>

⁴⁴⁵ INTERPOL, *Ecomessage* <<http://www.interpol.int/Crime-areas/Environmental-crime/Information-management>>

⁴⁴⁶ INTERPOL, *Resources* <<http://www.interpol.int/Crime-areas/Environmental-crime/Resources>>

As yet, the harmonised system has not developed a nomenclature for MLR products that distinguish seafood products by species or region. Seafood is classified instead according to whether it is fish, crustaceans, or molluscs and other aquatic invertebrates and whether it is live, fresh, chilled, frozen, dried, salted smoked.⁴⁴⁷ The nomenclature is designed for the use of customs officials, rather than fisheries and seafood port and inspectors.

The Green Customs Initiative is to prevent illegal trade and facilitate licit trade in environmentally-sensitive commodities.⁴⁴⁸ In relation to stratospheric ozone depletion, WCO's Project Sky Hole Patching provided assistance in preventing the illegal trade in ozone depleting substances. The WCO is the hub for the Green Customs Initiative and its partners comprise the secretariats of relevant multilateral environmental agreements as well as INTERPOL, the Organisation for the Prohibition of Chemical Weapons, UNEP and UNODC. WCO's fundamental modus operandi is to facilitate training, information delivery and exchange to build the capacities of national customs and other relevant law enforcement officials.

- ☛ The WCO harmonized commodity descriptions for fish and other MLR products is of marginal institutional relevance to progressing the universalization of jurisdiction over MLR crime.

The Financial Action Task Force

The Financial Action Task Force (FATF) is an intergovernmental collaboration of over 130 countries to combat money-laundering. Its Secretariat is located within the Secretariat of the OECD in Paris, France. In 1996, the FATF adopted 40 recommendations (revised in 2003) for participating countries to combat money-laundering. These were supplemented in 2001 by 9 special recommendations on combating terrorist financing which are implemented by participating countries and subjected to mutual evaluations by the FATF and related regional bodies.⁴⁴⁹

Recommendation 1 is that countries should criminalise money-laundering and that the crime of money laundering should include the widest range possible of predicate offences. Predicate offences are those criminal acts which generate valuable proceeds, i.e. proceeds of crime. Those proceeds usually flow to the organisers and higher order perpetrators of the crime, who may need to disguise their illicit source, i.e. launder the money. Predicate offences are typically serious offences, as indicated by their penalties, although they can also be specifically listed types of offences. Recommendation 1 also provides that predicate offences should include all serious offences under national law, i.e. usually offences punishable by a maximum penalty of more than one year's imprisonment, or, for those countries that have a minimum threshold for offences, all offences punishable by a minimum penalty of more than six months imprisonment.

In addition, Recommendation 1 urges each country to include the categories of predicate offences designated in the Recommendation's glossary, which includes environmental offences. However fisheries and other MLR crimes are not included. Recommendation 1 also suggests that predicate offences should include foreign offences, if the conduct that occurred in the foreign country would also have been an offence in the country where the money laundering is criminalised. This could connect MLR crimes in foreign jurisdictions with money-laundering elsewhere, making it of particular relevance to the transnational nature of MLR crime.

- ☛ It is reasonable to open dialogue with FATF to increase awareness of its members and the OECD Secretariat of the importance of MLR crimes, irrespective of the highly variable penalty ranges that apply to them under national laws. The objective would be to encourage the future inclusion by FATF of MLR crimes as a designated category of offences for predicate crimes in money laundering.

CONCLUSION

Options to develop the global legal framework for the universalisation of jurisdiction against MLR crime have been canvassed in this chapter, followed by a survey and assessment of global institutions that might carry forward that legal framework.

Global Legal Framework

A new international legal framework to harmonise definitions of certain MLR crimes would carry forward the universalisation of jurisdiction to enforce. It would build on existing international laws for criminal law enforcement cooperation by raising the understanding, profile and importance of MLR crime and by developing tailored provisions suited specifically to law enforcement within the multinational context and transnational commission of MLR crimes. The observations set out below In relation to

⁴⁴⁷ The WCO harmonised system nomenclature HS0301 to HS0307 classifies seafood according to whether it is live fish (HS 0301); fresh or chilled fish (HS0302); frozen fish (HS0303); fish fillets and other fish meat whether fresh chilled or frozen (HS0304); dried, salted or smoked fish (HS0305); crustaceans (HS 0306); or molluscs and flours or meals made of other aquatic invertebrates (HS 207). See: WCO HS Nomenclature, s 1 chap 3: *Fish and crustaceans, molluscs and other aquatic invertebrates*; available at www.wco.org.

⁴⁴⁸ The program was initiated in accordance with UNEP Governing Council Decision 21/27 on Compliance with and Enforcement of MEAs (February 2001).

⁴⁴⁹ FATF, *Who We Are* <http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1,00.html>

options to develop a global legal instrument seek both to enable States to prescribe harmonised MLR crimes and to exercise universal MLR enforcement jurisdiction.

- ☛ A new legal framework could take the form of commitments to adopt national legislation to harmonise criminalisation of MLR crimes in coordination with the criminalisation of other relevant 'crossover' crimes that support MLR crimes, such as bribery, money laundering, conspiracy and participation in organised crime syndicates. The legal framework could serve also as a basis for national law enforcement cooperation applied to the widest possible range of MLR offences, such as information exchange, mutual legal assistance, extradition and transfer of proceedings, as well as for operational initiatives such as joint investigations.

Soft law instruments may be more achievable in the near term than a legally binding international agreement. The difficulty of reaching consensus on binding terms also can result in a lowest common denominator in the adopted binding obligations. Soft law, in the form of guidelines and best-endavours commitments, on the other hand, may be expressed in more ambitious aspirational terms. Soft law can also build both consensus and international practice concerning international standards in the interim until binding measures are adopted. For example, guidelines on the universalisation of MLR jurisdiction could urge the further adoption of legally binding agreements at the bilateral or regional levels to facilitate cooperative enforcement actions (such as is urged also under the UN Drug Trafficking Convention).

- ☛ The most likely existing legal framework within which to situate a new binding legal standard would be the UN Convention on Transnational Organised Crime (CTOC). A protocol to CTOC could be formulated as dedicated to MLR crime or else it could embrace MLR crime in the wider context of crimes at sea. The most likely existing legal framework within which to situate a new, non-binding soft law international standard would be the International Plan of Action on Port State Measures to Combat Illegal Unregulated and Unreported Fishing National legislation, although this is potentially subject to institutional reticence as suggested below.

Marine

- ☛ The PSM-IUU Agreement, when it enters into force, will provide the most relevant legal framework for the universalisation of MLR crimes, particularly in relation to fisheries. A protocol to the Agreement, or a declaration or resolution by the parties to it, could seek to harmonise among its parties the adoption of national criminal provisions and to universalise enforcement jurisdiction by through law enforcement cooperation.
- ☛ The IPOA-IUU offers a promising basis upon which to build the non-legally binding normative infrastructure for universalised MLR crime. Likelihood of success in this endeavour is better than for a legally binding framework such as the PSM-IUU Agreement.

Environmental

- ☛ The legal model provided by the Basel Convention demonstrates how the universalisation of enforcement jurisdiction against MLR crime might evolve over time. First, the illegal activity is defined and the treaty parties commit to prevent and punish offenders. Second, the gravity of the illegality is categorised as being criminal at a serious level and technical assistance is made available to develop model criminal laws to prevent the activity and punish offenders. Third, a register of national criminal legislation and related enforcement measures is assembled and maintained on a shared database so as to promote transparency, efficacy and cooperation.
- ☛ CITES is not a suitable framework within which to a global legal framework to universally criminalise MLR crimes. The main disadvantage is that it would apply only to MLR already listed as endangered species under CITES. Most commercially managed fisheries are not listed. Furthermore, as CITES does not apply to actions other than illegal trade in endangered species, it cannot address such other harms to marine living resources as habitat destruction or destructive fishing practices.
- ☛ Among the CBD-related treaties, only the *Nagoya Protocol* addresses a significant MLR management issue in terms that relate to criminal acts. However, as it concerns a relatively narrow aspect of MLR management and has not yet entered into force and its negotiating parties rejected a criminal law model for its enforcement, the Nagoya Protocol is a fragile framework upon which to base the development of universalised MLR crime.

Criminal Justice

- ☛ There are signs of momentum gathering to address environmental crime under the CTOC. Naturally, this would concern environmental crime that is transnational and organised, which would cover much MLR. There is no suggestion yet to commence any negotiations on a CTOC protocol on natural resources and environmental crime. However, formulation of a binding protocol suitable to combat MLR crime would be conceptually straight forward. The CTOC is the natural and most likely global framework for new legally binding commitments to universalise MLR crimes.
- ☛ The OECD Bribery Convention offers very limited possibilities for universalising jurisdiction over MLR crimes. It applies already to corrupt transactions in the MLR sector. Even though widespread, these are only those involving international

transactions with foreign countries, involving also foreign public officials, active bribery and Parties that have ratified the OECD Convention.

- ☛ UNCAC applies primarily to domestic corruption without a transnational link required but does provide for international technical assistance and capacity building. It could provide a useful legal framework for capacity building in fisheries ports for fisheries and customs inspectors in order to constrain corrupt facilitation of MLR crimes.

Global Institutions

Likely institutional vehicles at the global level to carry forward an initiative for the universalisation of MLR crime were canvassed by categories: general, marine, environmental and criminal Justice institutions. The following recommendations are preliminary and require further substantive research on the relative merits of specific institutions and institutional strategies. Successfully Focus on IUU fishing

General

- ☛ UNGA could mandate that the UN Secretary-General prepare a report on the threats posed by MLR crime and opportunities to combat it. Ultimately, the objective might be to mandate negotiations of a protocol or guidelines to address MLR crime. An avenue through which this might be brought to the attention of the UNGA is the UNICOPLOLOS, discussed below.
- ☛ ECOSOC has an institutional presence in the area of environmental crime but it does not have the institutional ability to build national capacities in this area exercise nor does it have authority to mandate negotiations for new legal agreements. It is, therefore, not of primary importance in promoting the universalization of enforcement jurisdiction over MLR crimes.

Marine

- ☛ The devotion of a future UNICOPLOLOS theme to MLR crime would be a major step forward to secure the attention of the General Assembly and the UNSG. Priority for this area on UNICOPLOLOS agenda might be more accessible if presented as a facet of the broader area of maritime crime. Crimes against MLR could then be highlighted in panel presentations.
- ☛ The FAO is not very likely global institution to host efforts to universalise the criminalisation of MLR crimes. Although its outputs recognise the relevance of sanctions for MLR illegal fishing, it has been reticent to obligate criminal sanctions.

Environmental

- ☛ UNEP would be an appropriate platform to carry forward an initiative to universalise jurisdiction to combat MLR crime but would need to be in partnership with other international organisations more deeply engaged in MLR conservation and management, particularly the FAO and INTERPOL.

Criminal Justice

- ☛ Among UN organisations currently engaged in combatting environmental and MLR crimes, UNODC is likely to be most able to take forward an initiative to universalise jurisdiction to combat MLR crime. It is not a political body and will not mandate political actions such as the drafting of guidelines or commencement of treaty negotiations. Its role would be to conduct research and publication and to organise a workshop on the subject, if mandated to do so by a policy-making body such as the CCPCJ or CPC.
- ☛ CCPCJ is the primary United Nations system decision-making body forming policy in the area of environmental crime. The work that it has undertaken since 2007 is liable to be expanded in the future to address fishing crimes. The CCPCJ is, therefore, a most important vehicle for progressing the notion of universalised MLR crime within the United Nations system.
- ☛ To reinforce the work of the UNODC on MLR crime it might be possible for the CPC to pick up the MLR crime issue in 2015 as part of its mandate to set the agenda for international cooperative projects for the progressive development of criminal justice.
- ☛ Although UNICRI has no mandate to develop legal norms but functions only as a research institute or think tank, it could provide a forum for developing research and knowledge concerning global MLR crime, including aspects of the universalisation of national jurisdiction.
- ☛ INTERPOL is rapidly expanding its Environmental Crime Programme and many opportunities to promote the universalisation of jurisdiction over MLR crime are available through the new Fisheries Crime Working Group. A useful strategy could be to instigate an INTERPOL report on the contemporary problems of international legal gaps in national enforcement jurisdiction over fisheries or MLR crime that could be commissioned for consideration by the Fisheries Crime Working Group and that might canvass solutions including the universalisation of enforcement jurisdiction.

- ☛ The WCO harmonized commodity descriptions for fish and other MLR products is of marginal institutional relevance to progressing the universalization of jurisdiction over MLR crime.
- ☛ Dialogue with the FATF to increase awareness of its members and of the OECD Secretariat concerning the importance of MLR crimes would encourage the future inclusion by the FATF of MLR crimes as a designated of category of offences for predicate crimes in money laundering.

CHAPTER 11.

REGIONAL INSTITUTIONAL VEHICLES AND LEGAL MODELS

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REGIONAL LEGAL FRAMEWORK

The growth in prominence of transnational organised crime and the increasing prominence of the concept of sustainable development led the Ninth Congress on the Prevention of Crime and the Treatment of Offenders, in 1995, to discuss '[a]ction against national and transnational economic and organized crime and the role of criminal law in the protection of the environment: national experiences and international cooperation.'⁴⁵⁰ The Secretariat paper proposed directions for national and international action, suggesting that:

⁴⁵⁰ *Report of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/CONF.169/16 (12 May 1995) 40.

150. ... Agreement may be more easily reached at the regional level than at the interregional level, because of shared problems related to geographical proximity..., e.g. the Council of Europe has prepared a draft convention on the protection of the environment through criminal law, and

152. ... Ways should be found to improve the integration of criminal law into national and regional capacity-building packages in order to provide an important buttress to the enforcement of environmental laws and regulations, where necessary.

In fact, it has been at the regional level that legal codes on harmonising enactments against environmental crime have been developed and environmental crime law enforcement capacity building has taken place. The following survey considers regional legal frameworks and regional institutions that have developed to combat environmental crime. As in the previous chapter assessing global legal frameworks and institutions, regional legal frameworks are subdivided here according to their primary area of concern and according to their original purpose; i.e. whether they deal primarily with marine, environment, or criminal justice concerns. Institutional bodies have been similarly categorised as general political bodies, marine governance bodies, environmental governance bodies or crime-fighting institutions.

Marine Legal

Legal frameworks set in place for the management of marine living resources are dominated by formal legal cooperation measures for fisheries monitoring control and surveillance and by the treaty frameworks set in place under the Regional Seas Program of the United Nations Environment Programme (UNEP). Although the latter is concerned with the marine environment, it is primarily a legal framework for environment protection and is therefore categorised here as an environmental legal framework.

Fisheries Monitoring Control and Surveillance Treaties

A diverse a range of regional and bilateral legal agreements concerning international cooperation in monitoring, control and surveillance have been adopted by States with adjacent maritime zones concerning fisheries activities in waters under their jurisdiction.

The 1992 Niue *Treaty on Cooperation and Fisheries Surveillance and Law Enforcement in the South Pacific Region* provides a general obligation to incorporate to cooperate in the enforcement of fisheries laws and to develop regionally agreed procedures for fisheries surveillance and enforcement. Article 6 provides that:

‘a Party may by way of a Subsidiary Agreement or otherwise, permit another Party to extend its fisheries surveillance and law enforcement activities to the territorial sea and archipelagic waters of a Party. In such circumstances the conditions and methods of stopping, inspecting, detaining, directing to port and seizing vessels shall be covered by the national laws and regulations applicable in the State in whose territorial sea or archipelagic waters the fishery surveillance or law enforcement activity was carried out.’

Further provisions provide for cooperation in prosecutions (art VII) and enforcement of penalties (art VIII). Concerning prosecutions, Article VIII provides that the Parties may agree on procedures for the extradition of persons charged with offences against fisheries laws, for the holding of equipment and vessels in custody, accrediting advocates or expert witnesses in their respective courts, and for other legal assistance. Several subsidiary implementing agreements to the Niue Treaty have been adopted⁴⁵¹ and a comprehensive Multilateral Subsidiary Agreement was adopted in 2012 but has not yet come into force.⁴⁵²

Examples of other regional agreements on enforcement of MLR laws are the two bilateral agreements sequentially adopted between Australia and France, to facilitate their cooperation in enforcement of their respective fishing laws in their sub-Antarctic waters by enabling French vessels to patrol Australian waters and vice versa and to engage in hot pursuit of offending vessels.⁴⁵³

Other non-legally binding international arrangements have been entered into in order to facilitate hot pursuit, such as between Australia and South Africa for the Indian Ocean region.⁴⁵⁴ Non-legally binding international arrangements were established in 2000 between the members of the International Network for the Cooperation of Fisheries Related Monitoring Control and

⁴⁵¹ Examples include subsidiary agreements between Tonga and Tuvalu, Federated States of Micronesia and the Republic of the Marshall Islands, and Australia and Papua New Guinea.

⁴⁵² *Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*

<[https://www.ffa.int/system/files/Multilateral%20NTSA_Agreement%20on%20Strengthening%20Implementation%20of%20the%20Niue%20Treaty.p](https://www.ffa.int/system/files/Multilateral%20NTSA_Agreement%20on%20Strengthening%20Implementation%20of%20the%20Niue%20Treaty.pdf)
[df](https://www.ffa.int/system/files/Multilateral%20NTSA_Agreement%20on%20Strengthening%20Implementation%20of%20the%20Niue%20Treaty.pdf)>

⁴⁵³ *Treaty Between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and McDonald Islands*, opened for signature 24 November 2003, [2005] ATS 6 (entered into force 1 February 2005); *Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard island and McDonald Islands*, opened for signature 8 January 2007, [2011] ATS 1 (entered into force 7 January 2011).

⁴⁵⁴ Warwick Gullett and Clive Schofield, 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean' (2007) 22(4) *International Journal of Marine and Coastal Law* 545, 573. Erik Jaap Moleaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: the Pursuits of the *Viarsa* and the *South Tomi*' (2004) 19(1) *International Journal of Marine and Coastal Law* 19, 37-31.

Surveillance Activities (International MCS Network). Their objective is to enhance cooperation between national organisations responsible for fisheries enforcement.⁴⁵⁵

In Southeast Asia, a Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices Including Combating Illegal, Unreported and Unregulated Fishing in the South East Region operates to build regional capacity to monitor, control and conduct surveillance over fishing activities. Its objective is to sustain fisheries resources and the marine environment by strengthening fisheries management capacity in the region to conserve fisheries resources, manage fishing capacity, and combat illegal, unreported and unregulated (IUU) fishing.⁴⁵⁶ The RPOA was agreed to in May 2007 by Ministers responsible for fisheries from 11 regional countries⁴⁵⁷ and four existing regional fisheries organisations provide technical advice and assistance.⁴⁵⁸

Recently, a non-binding Code of Conduct concerning Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa was adopted by coastal states in the Gulf of Guinea.⁴⁵⁹ Article 7 provides that the Parties shall consult at the bilateral and subregional levels to formulate and harmonise their policies for conservation and management of MLR and shall cooperate to combat IUU fishing. Subsequent articles deal with law enforcement cooperation (art 8), including by national law enforcement officers embarked upon the patrol ships of other Parties (art 9). Duly designated embarked officers may authorise the foreign law enforcement vessels on which they are embarked to enter within the waters of the designating country and authorise the vessel's officials to assist in enforcement of the laws of the designating country. The Code of Conduct also provides that assets seized and forfeited during a law enforcement operation shall be disposed of in accordance with the laws of the country in whose waters the enforcement action took place (art 10).

- ☛ There are legal precedents in regional marine legal frameworks for cooperation in related criminal justice enforcement. The marine legal frameworks are regional fisheries management agreements. Less formal legal frameworks are networks for monitoring control and surveillance, particularly over IUU fishing. The forms of cooperation include intelligence sharing, joint enforcement operations, mutual legal assistance, extradition and sharing of seized assets. In some instances, the forms of cooperation already include extraterritorial exercise of criminal jurisdiction. These legal precedents suggest that expansion of criminal law enforcement cooperation to include a broader range of MLR is feasible.

Environmental Legal

Regional environmental standards that concern the exercise of criminal jurisdiction have been adopted principally for regional seas, under the auspices of the United Nations Environment Programme, and for European and African land territories. Three legal instruments at European regional level provide frameworks to combat environmental crime through environmental law enforcement cooperation. They were adopted by the Council of Europe and the European Union. The two African instruments are the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Flora and Fauna, which is open to all African countries, and the Southern African Development Community Protocol on Wildlife Conservation and Law Enforcement.

Regional Seas Conventions

The UNEP Regional Seas Programme (RSP) promotes the sustainable use and management of marine resources.⁴⁶⁰ Each of the 13 UNEP RSP regional areas⁴⁶¹ includes a regional action plan and nine of these are supported by framework treaties.⁴⁶² Six of those 9 regional framework treaties now have protocols specific to marine biodiversity:

1. Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region 1985;
2. Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South East Pacific 1989;
3. Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region 1990;
4. Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean 1995;
5. Protocol concerning the Conservation of Biological Diversity and the Establishment of Network of Protected Areas in the Red Sea and Gulf of Aden 2005; and
6. Black Sea Biodiversity and Landscape Conservation Protocol 2009.

⁴⁵⁵ www.imcsnet.org

⁴⁵⁶ *International Monitoring, Control and Surveillance Network for Fisheries-related Activities* <www.rpoa.sec.dkp.go.id/>

⁴⁵⁷ Australia, Brunei Darussalam, Cambodia, Indonesia, Malaysia, Papua New Guinea, The Philippines, Singapore, Thailand, Timor-Leste and Vietnam.

⁴⁵⁸ Regional advisory organisations: FAO/Asia-Pacific Fishery Commission; Southeast Asian Fisheries Development Centre; InfoFish and Worldfish Center.

⁴⁵⁹ Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Democratic Republic of Congo, Côte d'Ivoire, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Equatorial Guinea, Liberia, Mali, Niger, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone, and Togo.

⁴⁶⁰ United Nations Environment Programme, *About, UNEP Regional Seas Programme* <<http://www.unep.org/regionalseas/about/default.asp>>

⁴⁶¹ Black Sea, Mediterranean Sea, Wider Caribbean, Pacific, North East Pacific, South East Pacific, North West Pacific, East Asian Seas, South Asian Seas, Persian Gulf, Red Sea, Eastern Africa, and Western Africa.

⁴⁶² No general framework convention has yet been adopted in the South Asian Seas region, East Asian Seas region, North West Pacific region, South East Atlantic region, or the Upper South West Atlantic.

In the Wider Caribbean Region, for example, the Specially Protected Areas and Wildlife Protocol (SPAW Protocol) requires that its Parties prohibit certain actions, such as despoliation of protected areas (art 5) or the taking of protected species (art 10) but does not specify the criminal nature of breach of the prohibitions;⁴⁶³ nor, in its provision for mutual assistance, does it specify law enforcement cooperation measures (art 18). Similarly, the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean calls upon its Parties to prohibit despoliation of protected area (art 6) and the taking of threatened species (art 11) but do not require the offences against these prohibitions be criminalised. Within the region of the Red Sea and Gulf of Aden, as another example, the 2005 Protocol concerning the Conservation of Biological Diversity and the Establishment of Network of Protected Areas seeks to protect MLR through the creation of protected areas for important species of marine life, requiring special management of these regions including the careful management of threatened species⁴⁶⁴ and consideration of restoration of the population of threatened species⁴⁶⁵ but makes no provision in relation to MLR crime.

In addition to the regional seas framework conventions and their protocols, the UNEP Regional Seas Programme non-legally binding action plans make some provision for the conservation of MLR. The South Pacific Regional Environment Programme (SPREP), for example, has adopted an action plan specific to the Action Strategy for Nature Conservation and Protected Areas in the Pacific Island Region (2008-2012).⁴⁶⁶

- ☛ The UNEP Regional Seas Programme has adopted MLR protocols under framework conventions for six regions. Two of these protocols (Red Sea and Gulf of Aden 2005 Protocol⁴⁶⁷ and the Black Sea 2009 Protocol)⁴⁶⁸ have yet to enter into force.) Two regions within RSP that have adopted MLR related protocols are nevertheless not highly active areas in the UNEP RSP: East Africa is impacted by the instability in the region, particularly Somalia; and the South East Pacific. The variations in vitality can depend upon factors such regional; national governmental stability, the degree of their geo-political and marine interests convergence in marine management activities, and available funding. The innovations in each instrument primarily concern their harmonisation of environmental criminal standards.

Council of Europe Convention on the Protection of the Environment through Criminal Law

The Council of Europe Convention on the Protection of the Environment through Criminal Law (CoE Convention) was adopted on 4 November 1998.⁴⁶⁹ It ambitiously aims to harmonise environmental laws through, inter alia, common criminal policies and penalties and to enhance European legal cooperation in prosecuting environmental crimes. It is the only international treaty dedicated to combating environmental crime.

The CoE Convention is open for signature by both member and non-member States of the Council of Europe. It has been signed by 14 of the 47 member States of the Council of Europe but only Estonia has ratified and the treaty has not yet entered into force. As more than a decade has passed since its adoption, the poor rate of signature and ratification indicates that the obligations set out in the CoE Convention are not presently acceptable to member States.

Problems that have given rise to non-ratification may include a lack of precision in its provisions, the insuperable differences between the national legal cultures the Parties that the CoE Convention seeks to harmonise, together with a lack of flexibility for national variability in its implementation. The CoE Convention allows for no reservations, other than those specific options delimited in the treaty text (art 17).

The CoE Convention asserts, in its Preamble, that criminal law has an important part to play in protecting the environment but also recognises that protection of the environment must be achieved primarily through other measures. It emphasises that environmental violations having serious consequences must be established as criminal offences and that sanctions should apply also to legal persons such as corporations in order to prevent serious violations of environmental laws.

Article 2.1 focuses upon hazardous substances and nuclear activity. It requires the Parties to take measures at national level to criminalise the following offences when committed *intentionally*: discharge of *substances or ionising radiation* which causes or creates a significant risk death or serious injury to any person; the *unlawful discharge* of substances or ionising radiation which causes or is likely to cause lasting deterioration or death or serious injury; the *unlawful disposal*, treatment, storage, transport, export or import of *hazardous waste* which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; the *unlawful operation* of a plant in which a dangerous activity is carried out and

⁴⁶³ The Caribbean Environment Programme, SPAW – Specially Protected Areas and Wildlife, United Nations Environment Programme <<http://www.cep.unep.org/about-cep/spaw>>

⁴⁶⁴ Protocol concerning the Conservation of Biological Diversity and Establishment of a Network of Protected Areas in the Red Sea and Gulf of Aden 2005, art 9.

⁴⁶⁵ Ibid art 16.

⁴⁶⁶ Roundtable for Nature Conservation in the Pacific Islands, *Action Strategy for Nature Conservaiton and protected Areas in the Pacific Island Region 2008-2012*, <http://www.sprep.org/att/publication/000755_RoundtableActionStrategy.pdf>

⁴⁶⁷ Regional Seas Programme, *Red Sea & Gulf of Aden – Governing Instruments*, United Nations Environment Programme <<http://www.unep.org/regionalseas/programmes/nonunep/redsea/instruments/default.asp>>

⁴⁶⁸ Regional Seas Programme, *Black Sea – Governing Instruments*, United Nations Environment Programme <<http://www.unep.org/regionalseas/programmes/nonunep/blacksea/instruments/default.asp>>

⁴⁶⁹ *Convention on the Protection of Environment Through Criminal Law*, opened for signature 4 November 1998, CETS No 172 (not yet in force).

which causes or is *likely to cause* death or serious injury or substantial damage to the quality of air, soil, water, animals or plants; or the *unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances* which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants, when committed intentionally. (*emphasis added*)

The Council of Europe members that signed off on the Convention agreed to a formulation that means that discharges of substances or ionising radiation that are not unlawful ipso facto are criminalised if they entail release of pollution that causes or creates a significant risk of causing death or serious injury. They further agreed that the unlawful acts listed above should be criminalised in circumstances where both the release and the consequences are intentional.

In relation to unintentional or negligent acts a different approach was taken. Article 3.1 provides that:

Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law, when committed with negligence, the offences enumerated in Article 2, paragraph 1 (a) to (e).

However, Parties are explicitly enabled to limit the application of Article 3 by limiting it to circumstances of gross negligence (art 3.2), or by excluding its application to either property damage or to causation of significant risks to life and health (art 3.3). A catch-all provision in Article 4 provides that other specified unlawful activities, insofar as they are not covered by the provisions of Articles 2 and 3, shall be established as criminal offences or administrative offences, when committed intentionally or with negligence.⁴⁷⁰

Article 5.1 requires that Parties establish jurisdiction over the specified environmental offences when committed: in its territory; or on board a ship or an aircraft registered in it or flying its flag; or by one of its nationals, if the offence is punishable under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction. In addition, each Party is to establish jurisdiction over a criminal offence established by the Convention, in cases where an alleged offender is present in its territory and it does not extradite him to another Party after a request for extradition.⁴⁷¹ (art 5.2)

Other noteworthy features of the CoE Convention are its suggestions that appropriate sanctions for environmental offences shall include imprisonment and pecuniary sanctions and may include reinstatement of the environment (art 6) and that the proceeds of environmental crimes shall be confiscated (art 7). An important feature is corporate liability, in the form of criminal or administrative sanctions, although Parties may opt out of this (art 8). It also provides that environmental groups may be granted the right to participate in environmental crime trials, at the option of a Party holding the trial. The voluntary nature of this provision recognises the lack of a common practice allowing community groups to participate in trials.

The CoE Convention's measures for promoting national co-operation between the domestic authorities responsible for environmental protection and for investigating and prosecuting criminal offences are bare and might usefully be developed further. It also aims to foster international cooperation between parties in investigations and judicial proceedings relating to the environmental crimes that it establishes. (art 12) It is noteworthy that this is the sole provision dedicated to international cooperation and that it is lacking in detail.⁴⁷²

- ☛ It is almost a dozen years since the CoE Convention was adopted and it can be assessed as a failure as it has only one ratification. This may be because its provisions too broad and sweeping as well as too inflexible for divergent legal cultures of Council of Europe members, as it allows a very limited degree of dissent in the application of criminal sanctions.

EU – Community Directive on the protection of the environment through criminal law

In contrast to the formulation of common norms from zero in the Council of Europe Convention on Environmental Crime, European Community Directives on environmental crime were able to build upon a established common body of environmental acts previously agreed to be unlawful by members of the European Union.

⁴⁷⁰ These are: the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water; the unlawful causing of noise; the unlawful disposal, treatment, storage, transport, export or import of waste; the unlawful operation of a plant; the unlawful manufacture, treatment, use, transport, export or import of nuclear materials, other radioactive substances or hazardous chemicals; the unlawful causing of changes detrimental to natural components of a national park, nature reserve, water conservation area or other protected areas; the unlawful possession, taking, damaging, killing or trading of or in protected wild flora and fauna species.

⁴⁷¹ These bases for establishing jurisdiction extend beyond those customarily used by some countries, particularly those within the common law tradition. However, a Party may declare to the Convention Depository under paragraph 5.4 that the extended bases for exercise of jurisdiction set out in paragraphs 5.1.c (i.e. nationality) and 5.2 (i.e. non-extradition) shall not apply.

⁴⁷² It says little on mutual legal assistance and makes no provisions for extradition. This is explained by the presence of other treaties on law enforcement cooperation adopted by the Council of Europe. These include the *European Convention on Extradition*, opened for signature 13 December 1957, CETS No 24 (entered into force 18 April 1960), the *European Convention on Mutual Assistance in Criminal Matters*, opened for signature 20 April 1959, CETS No 30 (entered into force 12 June 1962), the *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*, opened for signature 30 November 1964, CETS No 51 (entered into force 22 August 1975), the *European Convention on the International Validity of Criminal Judgements*, opened for signature 28 May 1970, CETS No 70 (entered into force 26 July 1974), the *European Convention on the Transfer of Proceedings in Criminal Matters*, opened for signature 15 May 1972, CETS No 73 (entered into force 30 March 1978), the *European Convention on the Transfer of Sentenced Persons*, opened for signature 21 March 1983, CETS No 112 (entered into force 1 July 1985), and the *Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, opened for signature 8 November 1990, CETS No 141 (entered into force 1 September 1993).

Directive 2008/99/EC on the protection of the environment through criminal law (the 'Environmental Crime Directive') was adopted on 19 November 2008 by the European Parliament and the Council.⁴⁷³ It establishes measures relating to criminal law in order to protect the environment more effectively. (art 1) The Preamble to the Environmental Crime Directive expresses concern at the rise in environmental offences and at their effects, which are increasingly extending beyond the borders of the States in which the offences are committed. It asserts that experience has shown that the existing systems of administrative penalties or compensation under civil law have not been sufficient disincentives to prevent environmental offences being committed intentionally or with serious negligence and that they should be strengthened by the imposition of criminal penalties.

The Environmental Crime Directive operates by requiring Member States to impose criminal penalties in respect of serious infringements of Community law on the protection of the environment, if committed intentionally or with serious negligence. The relevant Community environmental law is already in place and the Directive adds to this by harmonising the use of criminal penalties in enforcing these environmental laws. The specified environmental protection laws are listed in the Annexes to the Directive. The environmental harms are listed under Article 3, summarised below. Paragraphs (f), (g) and (h) could apply to certain MLR crimes.

- a. discharge of materials or ionising radiation which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- b. the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants;
- c. the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006;
- d. the operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage;
- e. the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage;
- f. the killing, *destruction, possession or taking of specimens of protected wild fauna* or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- g. *trading in specimens of protected wild fauna* or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- h. any conduct which causes the significant *deterioration of a habitat within a protected site*; [and]
- i. the production, importation, exportation, placing on the market or use of ozone-depleting substances. (*emphasis added*)

Persons are to be subject to criminal penalties also for acts of omission or for inciting, aiding and abetting intentional conduct that causes the environmental harms listed in Article 3. The Directive requires, in Article 6, that corporations should be held liable where the offences have been committed for their benefit by any person who has a leading position within the corporation, as based on: a power of representation of the legal person; an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person.

The sanctions must be effective, proportionate and dissuasive penalties, whether applied against natural or legal persons. The sanctions against a natural person should be of a criminal nature but the sanctions against a corporation can be non-criminal. The Directive sets a minimum standard and Member States may prescribe more stringent measures. It does not prescribe criminal procedures or affect the operation of national court systems.

The European Union Directive was supported by studies on environmental crime that demonstrated large differences between the Member States in the criminal sanctions provided for environmental offences.⁴⁷⁴ Its process of implementation over an initial 18 month period required that Member States transpose its provisions into their domestic laws by 26 December 2010 (art 8.1). In June 2011, the European Commission gave notice to 10 Member States that they had failed to transpose the 2008 Environmental Crime Directive into their national laws. These EU Member States were given two months to comply by implementing the Directives as national legislation.⁴⁷⁵ By late October 2011, three Member States remained non-compliant and legal action against them was escalated. In March 2012, as the next step in infringement procedure, the European Commission referred Cyprus to the European Court of Justice for breach of the Environmental Crime Directive 2008/99/EC. The subsequent effectiveness of the Directive over the past two years, in terms of national transpositions, prosecutions and deterrence, is being assessed by the Commission.⁴⁷⁶

⁴⁷³ Council Directive 2008/99/EC on the protection of the environment through criminal law [2008] OJ L 328/28.

⁴⁷⁴ European Commission, *Environmental Crime* <http://ec.europa.eu/environment/legal/crime/studies_en.htm>

⁴⁷⁵ European Commission, *Environmental Crimes: Commission Asks 12 Member States to Implement EU Rules* <http://europa.eu/rapid/press-release_IP-11-739_en.htm>

⁴⁷⁶ See: <http://ted.europa.eu/udl?uri=TED:NOTICE:11251-2012:TEXT:EN:HTML&tabId=4>

EU – Community Directive on ship-source pollution

Community Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (the ‘Ship Pollution Crime Directive’) was adopted on 7 September 2005 by the European Parliament and the Council. It was supplemented by a Council Framework Decision 2005/667/JHA of 12 July 2005 which provides detailed rules on criminal offences and penalties as well as other provisions to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.⁴⁷⁷

The Ship Pollution Crime Directive states in its Preamble that there is a need for effective, dissuasive and proportionate penalties that the international regime for the civil liability and compensation do not provide. It asserts that the required dissuasive effects can only be achieved through the introduction of penalties applying to the ship-owner or master of the ship, owner of the cargo, the classification society or any other person involved in ship-source discharges of polluting substances. It applies to ships of any national flag and applies to the high seas, Community waters and to its Member States’ territorial seas and internal waters (art 3).

The amended Directive obliges Member States to impose criminal penalties for ship-source discharges of pollutants specified in the Directive. These are substances covered by Annexes I (oil) and II (noxious liquid substances in bulk) to the International Convention for the Prevention of Pollution from Ships, 1973 and its 1978 Protocol (Marpol 73/78), as amended up-to-date (art 1). Illicit discharges committed with intent, recklessly or with serious negligence are to be regarded as a criminal offences (art 4). However, to be regarded as criminal, such illicit discharges must also cause deterioration in water quality. Minor discharges that do not cause such deterioration water need not be regarded as criminal offences unless they are repeated, and cumulatively do result in deterioration of water quality. The Directive also makes provisions for enforcement measures, including enforcement cooperation between coastal and port States, and for reporting and studying the feasibility of further collective action.

In June 2010, the European Commission gave notice to 8 Member States that they had failed to comply with the 2009 Ship Pollution Crime Directive and gave them two months in which to enact national legislation to implement the Directive.

- ☛ The European legal instruments both seek to harmonise national criminal laws among their members to protect the environment and to coordinate law enforcement cooperation between them. Yet they are different from each other, in that the CoE Convention criminalises categories of environmental harms broadly defined, whereas the European Union instruments addresses breaches of national laws that implement EU environmental Directives that have already been adopted. The EU approach limits proscribed crimes to unlawful acts as referenced in the previous Directives. The reliance upon previously agreed standards, is a preferable model for a multilateral instrument on MLR crime because it leverages off already established consensus concerning what acts are to be defined as unlawful. Thus, environmental harms that countries have already agreed to treat as unlawful under MLR laws form the basis of the acts to be criminalised under a new multilateral instrument. The innovations of the European legal instruments in operational law enforcement cooperation are modest, as each parent organisation has already established substantial regional cooperation in criminal justice cooperation matters.

Convention on Migratory Species Regional Agreements

The 1989 Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS) seeks to ensure that its Parties protect migratory species listed in the Bonn Convention’s annexes.⁴⁷⁸ It also urges range States to cooperate in the formulation of regional conservation agreements between them. In relation to MLR, two binding agreements have been concluded to protect cetaceans and four non-binding memoranda of understanding (MOUs) have been adopted between governments for the conservation of cetaceans, sharks or turtles.

The Agreement on the Conservation of Cetaceans of the Black Sea Mediterranean Sea and Contiguous Atlantic Area⁴⁷⁹ seeks to prevent pollution, ensure sustainable coastal development, manage vessel traffic and reduce the impacts of over-fishing on both large and small cetaceans within the Black Sea, Mediterranean Sea and along the Atlantic coasts of North Morocco and South Portugal⁴⁸⁰ and it covers all species of toothed whales, except the sperm whale, within the area of the Baltic Sea, North Sea and the Northern Atlantic adjacent to Ireland, Portugal and Spain.⁴⁸¹ It includes a management plan that sets out measures for the reduction of marine pollution and cetacean by-catch and for the establishment of an international database about species ecology and population status. It also calls for parties to implement domestic legislation prohibiting the intentional killing and taking of small cetaceans.⁴⁸²

⁴⁷⁷ A constitutional dispute between European Community institutions as to the appropriate legal basis for introducing criminal penalty provisions arose and the matter was taken to the European Court of Justice which decided on 23 October 2007 to annul the Framework Decision, thereby disrupting the implementation of the Directive. Consequently, the Directive was amended by *Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements* [2009] OJ L280/52.

⁴⁷⁸ Convention on Migratory Species, *Introduction to the Convention on Migratory Species*, 2004 <<http://www.cms.int/about/intro.htm>>.

⁴⁷⁹ The annexes list species threatened with extinction or that would benefit from international cooperation across their migratory ranges. *Agreement on the Conservation of Cetaceans in the Black Sea Mediterranean Sea and Contiguous Atlantic Area*, opened for signature 24 November 1996, 36 ILM 777 (entered into force 1 June 2001).

⁴⁸⁰ Convention on Migratory Species, *ACCOBAMS*, 2004 <http://www.cms.int/species/accobams/acc_bkrd.htm>.

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

An MOU has been signed for the protection of cetaceans within the Pacific region. The MOU seeks to coordinate ongoing conservation efforts for whales and dolphins including by standardised data reporting on stranded cetaceans and public education initiatives to raise awareness of the dangers of ocean pollution.⁴⁸³ An MOU on the Conservation of Migratory Sharks been signed by 26 nations worldwide. It established a conservation plan which encourages research and information exchange about migratory shark populations and the development of plans to protect shark populations from direct fishing and being taken as by catch.⁴⁸⁴

Two regional MOUs for the Protection of Marine Turtles have been concluded for the Indian Ocean and in the South East Asian regions. Conservation and management plans developed as part of the MOUs aim to reduce the incidental capture of marine turtles as part of fishing activities, to protect turtle nesting sites and to prohibit the direct killing or capturing of turtles.⁴⁸⁵ The rehabilitation of turtle populations and the exchange of information obtained as a result of increased research are also key objectives.⁴⁸⁶ An MOU relating to turtles migrating along the African Atlantic coastline has also been developed with a conservation plan that mainly focuses on collecting data relating to turtle ecology and threats to turtle populations.⁴⁸⁷ A monitoring and protection network for nesting and feeding sites is also a primary goal of the conservation plan developed under this memorandum.

- ☛ Regional legal arrangements for conservation of MLR under the Convention on Migratory Species concern migratory species, but not other categories of MLR. The one legally binding agreement does not address issues of criminal jurisdiction, although it does call for its Parties to adopt domestic legislation to prohibit a defined action. Other regional legal arrangements adopted under the CMS take the form of MoUs, which are not legally binding, suggesting weaker political commitment by the parties, and also do not address enforcement through the exercise of criminal jurisdiction. Therefore, regional arrangements adopted under the CMS do not appear to be a promising way forward for the universalisation of criminal jurisdiction over MLR crime.

Lusaka Agreement on Cooperative Enforcement Operations

In Southern Africa, The *Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora* opened for signature 9 September 1994, 1950 UNTS 35, and entered into force 10 December 1996.⁴⁸⁸ It is open to all African states.

The principal function of the Lusaka Agreement is to establish the Lusaka Agreement Task Force (LATF). It facilitates the exchange of information, including criminal intelligence, and conducts investigative operations, including undercover, within the territories of its parties, subject to party consent (art V). A Governing Council is also established to set the general policies of the Task Force (art VII) and it meets biennially. The Lusaka Agreement can be considered as an agreement to implement the *Convention on International Trade in Endangered Species* (CITES). It is described as having had a 'rocky ride', remaining in limbo for its first few years due to lack of funds, being regarded warily the majority of African States and as unrelated to CITES Secretariat work.⁴⁸⁹ Although noted at its inception for its potential, it was also observed to suffer from an absence of provisions for legal harmonization of the wildlife laws of the Parties.⁴⁹⁰

The Lusaka Agreement Governing Council has since begun to address the problem of lack of harmonisation. At the 6th Governing Council Meeting, Decision IV/1 on Harmonization of Parties' National Wildlife Enforcement/Management Laws and Regulations was adopted. It called upon the Parties to undertake measures to harmonize their national wildlife management laws and regulations to incorporate the provisions of the Lusaka Agreement and to facilitate the operations of the Lusaka Agreement Task Force and instructed the Director of the Task Force to collaborate with partners to assist the Parties in this process. Governing Council Decision VI/1 on development and harmonisation of wildlife laws and regulations then called upon the Parties to speed up the harmonisation process and to ensure comparable punishment for similar violations and listing of wildlife offences as extraditable offence, as well as to convene an expert wildlife law workshop(s) to follow up on the strengthening and harmonisation of wildlife laws.

- ☛ The Lusaka Agreement seeks to improve law enforcement cooperation between African states combating wildlife crime. However, this objective has been frustrated in part by a lack of harmonised wildlife crime laws in between the cooperating parties, although they have sought to address this post hoc. Implementation of the Lusaka Agreement is focused upon terrestrial fauna rather than MLR.

⁴⁸³ Convention on Migratory Species, *Pacific Cetaceans*, 2004 <http://www.cms.int/species/pacific_cet/pacific_cet_bkrd.htm>.

⁴⁸⁴ Convention on Migratory Species, Memorandum of Understanding on the Conservation of Migratory Sharks, Annex 3, *Conservation Plan*, 27 September 2012.

⁴⁸⁵ Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South East Asia, 23 June 2001, amended 1 March 2009, Conservation and Management Plan, 1.

⁴⁸⁶ Ibid 3.

⁴⁸⁷ Convention on Migratory Species, *Marine Turtles- Africa*, 2004 <http://www.cms.int/species/africa_turtle/AFRICAturtle_bkgd.htm>.

⁴⁸⁸ Seven nations are Parties (Congo, Kenya, Uganda, Zambia, Lesotho, Tanzania, Liberia) and three others are signatories. For further information see: <http://www.lusakaagreement.org/faqs.html>

⁴⁸⁹ Rosalind Reeve, *Policing International Trade In Endangered Species: The CITES Treaty and Compliance* (The Royal Institute of International Affairs, 2002) 233.

⁴⁹⁰ Alex Dehgan, 'Determining Lusaka's Potential' (1998) 1 *Journal of International Wildlife Law & Policy* 143.

Southern African Development Community (SADC) Protocol

The Southern African Development Community (SADC) *Protocol on Wildlife Conservation and Law Enforcement* was opened for signature 18 August 1999 and entered into force on 30 November 2003. It has 14 signatories.⁴⁹¹ The SADC Protocol was conceived subsequent to the Lusaka Agreement as an alternative to it. However, in the decade since its adoption, the SADC Protocol has gained less traction in terms of resources and implementation effort.

- ☛ Both African treaties are focused on combating wildlife crime, rather than MLR crime, and neither addresses the need for common legal definitions of that wildlife crime. The African instruments are distinct from the European ones, in that the African instruments focus only on wildlife and flora law enforcement, and only on law enforcement cooperation rather than on harmonisation of those laws also.

REGIONAL INSTITUTIONS

Many regional institutions have been established around the world to bolster economic and political solidarity, environmental protection or marine resources management. They are greater in number than global institutions for these purposes but sometimes are more poorly resourced and can be ephemeral. As a general rule, regional organisations for economic co-operation are categorised here as general mandate organisations, due to the broad reach of economic cooperation. They are typically better resourced and more robust than narrowly mandated environmental or fisheries management organisations.

General Organisations

ASEAN

The Association of South East Asian Nations (ASEAN) comprises 10 members⁴⁹² and was established in 1967, to promote, inter-alia regional cooperation and mutual assistance to accelerate economic growth, social progress and cultural development, peace and stability.⁴⁹³ It produces a regular regional 'state of the environment' report and aspires to promote sustainable development in the region. ASEAN Vision 2020, adopted in 1997, the ASEAN Charter, adopted in 2008, and the Roadmap for an ASEAN Community, adopted in 2009, are each non-binding regional aspirations that reference sustainable development. Section D of the Roadmap, on Promoting Environmental Sustainability of the ASEAN Socio-Cultural Community Blueprint 2009-2015, includes the sustainability of the coastal and marine environment and sustainability of natural resources and biodiversity. ASEAN has developed a legally binding framework for law enforcement cooperation and established regional police co-operation under the framework of ASEANPOL.

- ☛ ASEAN maintains an environmental and marine conservation focus in its work and is also developing law enforcement cooperation as it moves towards deeper regional integration. However, it has not yet advanced to legally binding and substantive arrangements for MLR conservation and management and cooperation in law enforcement is not yet deeply developed.

ECOWAS

The Economic Community of West African States (ECOWAS) comprises 15 states⁴⁹⁴ and was founded in 1975 with the objective of promoting 'integration in all fields of activity, particularly industry, [including]... agriculture, natural resources,'⁴⁹⁵ The ECOWAS is a relatively robust organisation, compared to other institutions in the region. It is one of the regional bodies supporting the non-binding Code of Conduct concerning Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa, discussed above. In this initiative, support was also provided by other regional organisations with mandates relevant to the suppression of MLR crime, namely, the Economic Community of Central African States (ECCAS) and the Gulf of Guinea commission That (GGC).

- ☛ Although the ECOWAS framework does not currently focus on MLR crime per se, the framework is robust enough to provide a pathway to a regional framework through a protocol to the ECOWAS Convention on a non-binding MOU to harmonise a regional approach MLR crime.

⁴⁹¹ The Protocol itself is not published in a treaty series but a scan of the original, signed text of the protocol can be found on the SADC website at <<http://www.sadc-tribunal.org/docs/WildlifeConservation.pdf>> and on the EcoLex website at <<http://www.ecolex.org/ecolex/ledge/view/RecordDetails.jsessionid=E24AE4F9805C30F14163010EA600726B?id=TRE-001348&index=treaties>>. It has no official citation. The citation for the SADC Treaty is (1993) 32 ILM 120 and it can be found on the SADC website <<http://www.sadc.int/>>

⁴⁹² Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

⁴⁹³ ASEAN, *Overview* <<http://www.aseansec.org/overview/>>

⁴⁹⁴ Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo

⁴⁹⁵ ECOWAS, *Member States* <<http://www.ecowas.int/>>

European Union

The European Union is the world's most wealthy, broad mandated and robust regional organisation. It comprises 28 States,⁴⁹⁶ having grown from six countries when the organisation was founded in 1958 as the European Economic Community.⁴⁹⁷ The EU comprises the world's largest economy, with about 20% of global imports and exports. Its Secretariat draws upon the human resources of about 38,000 intergovernmental civil servants.

The EU has evolved from its original conception as a common market into a political union with a broad mandate. Its rules for environmental protection, developed to ensure that national environment protection laws do not disrupt a 'level playing field' for economic competition among its members, are sometimes world leading innovations.

The EU Common Fisheries Policy, also intended to maintain a level playing field, involves pervasive and detailed rule-making. The Common Fisheries Policy was established in 1982, consolidating fisheries instruments adopted early in the previous decade, and deals with a plethora of global fisheries sustainability issues.⁴⁹⁸ The EU Common Fisheries Policy is administered primarily through the European Commission Directorate on Maritime Affairs and Fisheries (DGXI) and the European Fisheries and Control Agency, as well as the European Parliament Committee on Fisheries, and the Council of Ministers' Agriculture and Fisheries Council, with additional support from the EU Economic and Social Committee and the Committee of the Regions (Commission for Natural Resources).

Justice and Home Affairs has evolved to become the third pillar of the integration of Europe. It is administered within the Council of ministers by a Ministerial Council on Justice and Home Affairs. Other principal EU law enforcement cooperation institutions include: EuroPol, the European Police Office established in 1993 as an executive agency of the EU; and EuroJust, the European judicial cooperation in unit established in 2001. Transnational organised criminal investigations are conducted by joint investigation teams that can conduct cross-border operations, covert operations and hot pursuits across borders. They are supported by additional institutions such as the European Anti-Fraud Office (OLAF) and a raft of EU legislation empowering a wide range of law enforcement cooperation.

- ☛ The EU infrastructure for administration of MLR is more extensive and robust than for any other group of States in the world. The EU also has established a deep level of integration in the field of law enforcement. The precedent that it has established in the area of criminal law enforcement of environmental standards indicates that the same could be developed for fisheries conservation and management standards. Furthermore, this is the sophistication of EU law enforcement cooperation provides a solid foundation for such cooperation in enforcing MLR standards. However, the sophistication of EU legislative processes and the size and diversity of its bureaucratic ramparts might mean that innovative universalisation of criminal jurisdiction over MLR crime will be carefully considered process that can only be realised in the medium rather than short-term.

Council of Europe

The Council of Europe is an organisation of 47 member States with a primary mission to promote human rights through the rule of law, civil rights, democratic institutions, and criminal justice.⁴⁹⁹ It has adopted a series of regional conventions concerning landscape, conservation of wildlife and natural habitats, air quality, and access to environmental justice.

- ☛ Environmental protection forms a subsidiary area of its work. Institutionally, it has a far narrower mandate and vastly less resources than the European Union.

Marine Organisations

Regional institutions for marine affairs cover a wide range of functions, including ensuring the safety of commercial maritime vessels and seafarers, regulating vessel traffic, protecting the marine environment, protecting customs borders, preventing transnational organised crime, interdicting pirates, conducting marine scientific research, managing fisheries, conserving biodiversity, etc. Rather than serving all these functions within one organisation, an individual regional marine organisation is established usually to serve only one or two such functions.

The safety of maritime vessels, seafarers and traffic is not directly relevant to MLR crime. Those concerned with protecting sovereignty (customs borders, transnational organised crime and piracy) were treated above under the heading of general organisations. Those regional institutions with the purpose of protecting the marine environment are categorised below as

⁴⁹⁶ Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, (an additional five candidate countries are seeking membership).

⁴⁹⁷ EUROPA, *How the EU Works* <http://europa.eu/about-eu/index_en.htm>

⁴⁹⁸ Maritime Affairs and Fisheries, *Directorate-General for Maritime Affairs and Fisheries*, European Commission <http://ec.europa.eu/dgs/maritimeaffairs_fisheries/index_en.htm>

⁴⁹⁹ Council of Europe <<http://hub.coe.int/>>

environmental organisations. Therefore, only institutions with a fisheries management function are considered under this heading of Marine Organisations.

Regional Fisheries Management Organisations

Regional fisheries management bodies and regional fisheries management organisations (RFMOs) have been established where there are active international fisheries and for waters where fish stocks cross international maritime boundaries. Although most were set up in the past four decades, the history of regional fisheries management organisations stretches back to 1902 with the creation of International Council for the Exploration of the Sea, an intergovernmental organisation for scientific research in the North East Atlantic Ocean. RFMOs vary in their mandates, functions and management powers, variously providing research, advice, quotas, inspections and enforcement.⁵⁰⁰

At least 40 Regional Fisheries Bodies and RFMOs are in place worldwide, 10 of them established under the FAO and the others under independent regional conventions and arrangements.⁵⁰¹ Those RFMOs that have adopted harmonised standards for port State measures to combat IUU fishing include the:⁵⁰²

1. Western and Central Pacific Fisheries Commission (WCPFC)
2. Pacific Islands Forum Fisheries Agency (FFA)
3. Commission for the Conservation of Southern Bluefin Tuna (CCSBT)
4. Inter-American Tropical Tuna Commission (IATTC)
5. Indian Ocean Tuna Commission (IOTC)
6. Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)
7. North Atlantic Fisheries Organisation (NAFO)
8. North East Atlantic Fisheries Commission (NEAFC)

The dynamics within each of these bodies and organizations vary in each regional context. The fishing situation in a region will be strongly influenced by the depth of participation of distant water fishing States, the political and economic strength of the coastal states, the relative numbers and economic power of each grouping within the regime, as well as by the abundance of target species that provide fishing opportunities, the depth of impacts on other marine biodiversity and by the mandate of the organisation as crafted into the governing legal instrument. Therefore, RFMOs need to be considered individually for their potential as vehicles for the universalisation of criminal jurisdiction over MLR crime.

Generally, it may be said that regional fisheries bodies and RFMOs s enjoy longevity and adequate resources to fulfil their mandates and have the powers to adopt regional policies, such as concerning MLR crime.

Indicators that regional fisheries bodies and RFMOs might be suitable to carry forward the universalisation of criminal jurisdiction over MLR crime include the presence of: numerous coastal States with clearly defined MLR conservation and management interests; numerous and/or strong Coastal State participation; distant water fishing States with benign interests in the fisheries and strong law enforcement capacity; as well as a governing treaty and constitutional structure that facilitates innovation and integrates broad MLR conservation and management objectives. Therefore, the possibility of regional fisheries bodies adopting protocols or decisions on harmonising MLR crime and extending enforcement jurisdiction extraterritorially between their parties needs to take these factors into account in each regional context individually.

- ☛ An RFMO that might be suitable to carry forward the universalisation of criminal jurisdiction over MLR crime is the Pacific Islands Forum Fisheries Agency. The FFA provides a strong coastal state base of interest and provisions in the Niue Treaty that include mutual legal assistance in criminal prosecutions and civil procedure confiscations suggested that this is a feasible development in the south-west Pacific region.

The Regional Plan of Action to Promote Responsible Fishing Practices Combat IUU Fishing cover actions for the conservation of fisheries resources and their environment, managing fishing capacity, and combating IUU fishing in the areas of the South China Sea, Sulu-Sulawesi Seas (Celebes Sea) and the Arafura-Timor Seas. The RPOA member States have developed a regional data base for the sharing of IUU vessel information and are currently in the process of developing a framework for the listing of vessels.

- ☛ The RPOA offers a unique opportunity for a harmonised regional approach to MLR crime, particularly fisheries crime, in Southeast Asia.

⁵⁰⁰ Judith Swan 'Regional Fishery Bodies and Governments: Issues Action and Future Directions' *FAO Fisheries Circular No. N59* (Rome, FAO 2002).

⁵⁰¹ S.H. Marashi 'Regional Fishery Bodies and Arrangements: the Role of FAO Regional Fishery Bodies in the Conservation and Management of Fisheries' *FAO Fisheries Circular No. 916* (Rome, FAO, 1990).

⁵⁰² Judith Swan 'Regional Fishery Bodies and Governments: Issues Action and Future Directions' *FAO Fisheries Circular No. N59* (Rome, FAO 2002).

Environmental Organisations

UNEP Regional Seas Programme - Regional Coordinating Units

The UNEP Regional Seas at any Programme (RSP) was established in 1974 as a global programme to combat marine pollution through regional marine arrangements. Its initial focus on the prevention of marine pollution has grown into a more comprehensive concern with sound marine and coastal management, including the conservation of marine living resources. It has set in place regional governance arrangements for 13 marine regions⁵⁰³ and works in partnership with five other regional seas arrangements that were established independently of UNEP, making 18 regional seas arrangements in all.⁵⁰⁴ The UNEP RSP now involves more than 143 countries.⁵⁰⁵

The individual UNEP regional programs are each serviced by a secretariat either provided by UNEP or established by the individual regional program itself. UNEP provides the secretariat for six regional seas programs.⁵⁰⁶ The six regional programs independent of UNEP have each established their own constitutional arrangements under a regional treaty and an independent Secretariat.⁵⁰⁷

Regional Seas Programme MLR Protocols and Secretariats

INDEPENDENT PROGRAMME	UNEP REGIONAL SEAS PROGRAMME	FRAMEWORK CONVENTION	MLR PROTOCOL	UNEP SEC'TARIAT	FUNDS SOURCE
Baltic Sea		✓			
North East Atlantic		✓			
Antarctic Ocean		✓	✓		✓
Arctic Sea					
Caspian Sea					
	Mediterranean Sea	✓	✓	✓	✓
	Wider Caribbean	✓	✓	✓	✓
	East-Asian Seas			✓	
	Eastern Africa Seas	✓	✓	✓	
	West & Central Africa	✓		✓	
	North-West Pacific			✓	
	Black Sea	✓	✓		
	Kuwait region	✓			
	Red Sea & Gulf Aden	✓	✓		✓
	South Pacific	✓			
	South-East Pacific	✓	✓		
	South-Asian Seas				
	South-West Atlantic				
5	13	12	7	6	

As with RFMOs, the dynamics within each regional seas program varies. The vitality of an individual program will be strongly influenced by the level of regional political and economic integration, of available operational funding, and the presence of driving economic forces. The participation of economically developed coastal states, their clearly defined benign interests in the regional marine environment, their relative numbers within the regime, as well as the character of impacts on marine biodiversity are all factors determining the relative capability and effectiveness of an individual RSP. Therefore, regional seas programs and need to be considered individually within their regional contexts for their potential as vehicles for the universalisation of criminal jurisdiction over MLR crime.

Among the RSP Secretariats administered by UNEP, two have members with developed economies, being the Mediterranean (with EU members) and the Wider Caribbean Region (with United States membership). The presence of developed economies can introduce resources and expertise that invigorate the RSP and new initiatives to combat MLR crime. Among the RSP Secretariats not administered by UNEP, regional interests among members are more diverse for the Red Sea and Gulf of Aden region (where the 2005 Protocol has not yet come into force) than for the South East Pacific (where the 1989 Protocol has).

The Permanent Commission for the South East Pacific, which administers the 1989 Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South East Pacific engages in a significant efforts to combat IUU fishing and other

⁵⁰³ Black Sea, Wider Caribbean, East-Asian Seas, Eastern Africa, Kuwait region, Mediterranean, North-West Pacific, Red Sea and Gulf of Aden, South-Asian Seas, South-East Pacific, South Pacific, South-West Atlantic, West and Central Africa,

⁵⁰⁴ Baltic Sea, North East Atlantic Ocean, Antarctic Ocean, Arctic Sea and Caspian Sea.

⁵⁰⁵ Regional Seas Programme, *About*, United Nations Environment Programme <<http://www.unep.org/regionalseas/about/default.asp>>

⁵⁰⁶ Caribbean; East Asian seas, East African seas, Western African seas, Mediterranean sea, North-West Pacific.

⁵⁰⁷ Those 6 sea regions that have a secretariat provided other than by UNEP are the: Black Sea; North East Pacific; Red Sea and Gulf of Aden; Persian/Arabian Gulf; South Asian Seas; South East Pacific; and Pacific.

maritime crime in the region.⁵⁰⁸ For example, it has conducted regional consultations and national studies and national workshops on the regional implementation of the 2009 Port State Measures Agreement on Combating IUU Fishing. It appears to display a convergence of regional interests in and commitments to combating MLR crime which would augur well for regional coordination to harmonise MLR crime definitions and to cooperate in extraterritorial enforcement efforts.

☛ The Permanent Commission for the South-East Pacific is an appropriate address from which to commence efforts to combat MLR crime under the RSP program. As UNEP administers the Secretariats for the Mediterranean and for the Wider Caribbean Region, it could strengthen the possibility of action in those regions over MLR crime, if UNEP were to support such an initiative. The convergence of national interests in marine conservation in the Wider Caribbean region, in particular, and the resources and as an expertise is introduced through the participation of the United States in the RSP, makes the Wider Caribbean region Secretariat a promising vehicle to carry forward to universalise criminal jurisdiction.

CONCLUSION

Regional agreements and institutions provide opportunities for a group of States to coordinate the harmonisation of national MLR criminal laws and to cooperate in their extraterritorial law enforcement. They provide a platform for the universalisation of criminal jurisdiction at a level that is less than global but that can be regarded as a step towards a new global norm.

European regional efforts to achieve harmonisation of environmental criminal law suggests that adding to international obligations already agreed by attaching criminal penalties to their breach is a simpler approach, and more likely to enjoy success, than crafting new primary international obligations with criminal penalties. This is surely one of the reasons that the EU Council Directive of 2008 on the protection of the environment through criminal law is simpler and more successful than the 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law. Currently, the most extensive international obligations and supporting organisational arrangements concerning MLR conservation and management at the regional are to be found in regional fisheries management organisation (RFMO) agreements and regional seas programs (RSPs) for environmental protection.

The survey of these indicates that RFMO agreements provide suitable frameworks for universalising jurisdiction to combat MLR crime. RFMO agreements often set out implementation measures that include enforcement procedures, which could be extended to harmonise extraterritorial enforcement jurisdiction against foreign (and domestic) vessels, crew and assets, based on a set of circumstances governed by individual regional MLR management organisations. Such exercises of enforcement jurisdiction could include cooperation in freezing financial assets of corporations and beneficiaries, blacklisting vessels, and issuing warrants against individuals charged with IUU fishing or associated non-fishing offences such as support or 'crossover' crimes. The Pacific Islands Forum Fisheries Agency and the RPOA process in Southeast Asia provide possible institutional vehicles to take forward this initiative in the south-west Pacific region, as it provides a strong base of interest for Coastal States, some of which have already coordinated extended criminal jurisdiction.

Environmental protection agreements and programs for regional seas may also offer good prospects for the universalisation of criminal jurisdiction at regional level against MLR crimes. None of the UNEP RSP framework agreements or their protocols deal specifically with MLR crime but they do provide a framework for the adoption of new additional protocols or instruments to universalise jurisdiction over MLR crime. In particular, the Permanent Commission for the South Pacific, working with its framework convention and the 1989 Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South East Pacific, and the UNEP Secretariat for the Wider Caribbean Region, together with its framework convention and the 1990 Protocol on Specially Protected Areas and Wildlife, appear likely partners in a project to universalise criminal jurisdiction in the region over MLR crime.

The harmonisation of national MLR criminal laws and cooperation in their extraterritorial enforcement can be promoted at regional level by means of one or more instruments or arrangements adopted by a regional organisation, such as agreements, guidelines, resolutions or action plans. To maximise flexibility among its members, if required, these might nest a range of enforcement options and encourage them to be carried forward at subregional or bilateral levels within the framework of the regional MLR management organisation or by its individual State members, depending on the available exercise of enforcement jurisdiction extraterritorially or over individual persons, vessels or companies under the various legal systems of the member States. Thus, regional universalisation of criminal jurisdiction over MLR standards could be introduced in a gradual process by willing member States, rather than as a sweeping revision of MLR laws.

⁵⁰⁸ La Comisión Permanente del Pacífico Sur <<http://www.cpps-int.org/>>

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